No. 06-_____

In The

Supreme Court of the United States

ERROL D. BEUMEL, JR.,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition For Writ Of Certiorari To The Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are a defendant's Sixth Amendment rights under *Blakely v. Washington* violated by submitting a redundant list of derivative aggravators to a sentencing-phase jury, and requiring it to make determinations that are beyond the competence of a lay jury?

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PETITION FOR WRIT OF CERTIORARI

Errol D. Beumel, Jr. respectfully petitions this Court to issue a writ of *certiorari* to the Indiana Supreme Court to review the judgment below.

OPINIONS BELOW

The Indiana Supreme Court's order denying review (App., *infra*, 33-34), the Indiana Court of Appeals' opinion affirming the trial court (App., *infra*, 1-18), and the trial court's Order of Judgment and Sentence (App., *infra*, 19-32), are unreported. The Court of Appeals' opinion is available at http://www.in.gov/judiciary/opinions/pdf/12280605ghs.pdf.

JURISDICTIONAL STATEMENT

The Indiana Supreme Court, by a divided vote, denied review of this case on March 8, 2007. This Court has jurisdiction to review that order by writ of *certiorari* under 28 U.S.C. § 1257(a) (2007).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation[.]"

STATEMENT OF CASE

1. ***Nature of Issue on Certiorari.*** This case highlights the ongoing and urgent need for this Court's explicit guidance in protecting the Sixth Amendment rights of defendants in States with determinate sentencing systems. A generation ago, this Court issued *Miranda v. Arizona*, 384 U.S. 436 (1966) because the Nation's experience in the wake of *Escobedo v. Illinois*, 378 U.S. 478 (1964) had revealed a dire need for bright-line, step-by-step direction in implementing the Fifth Amendment. Today, cases like this one illustrate how unguided, *ad hoc* efforts of local trial courts to implement *Blakely v. Washington*, 542 U.S. 296 (2004) can undercut the same Sixth Amendment rights that *Blakely* sought to vindicate. Other defendants elsewhere have likely petitioned this Court to review sentences reflecting other trial courts' errors in putting *Blakely* into practice. Particularly if consolidated with other such cases, this case would help the Court establish clear post-*Blakely* guidelines for ensuring that jury trials on sentencing facts serve their basic Sixth Amendment purpose – this generations' *Miranda*.

2. ***Background Facts.*** From 2001 through early 2003, Petitioner Errol D. Beumel, Jr. ("Mr. Beumel") struggled with drug addiction and mental illness. In March 2001, he sought a psychiatrist, portraying himself as ADHD to obtain the prescription amphetamine Adderall, which he was abusing illegally. (Tr. 1423-24.) However, the psychiatrist's tests suggested prodromal schizophrenia, for which the doctor prescribed the anti-psychotic drug Risperdal. (Tr. 864-65.) Despite that treatment, Mr. Beumel's condition continued to deteriorate, and by early 2002, the former A-B student was receiving D's and F's in his Purdue University classes. (Tr. 560-61.)

By Thanksgiving 2002, he exhibited obsessive religious behavior after finding a West Virginia church, the R.A. West Ministries. (Tr. 561-64.) He would listen to tapes of sermons by "Brother West" for "two (2) and three (3) days at a time without sleeping," and described to his mother "that God was turning pages in the Bible faster than he could almost read and that he was underlining what he wanted him to read as they went." (Tr. 564-65.) He attempted a bus trip to that church in January 2003, but returned the same day because "[h]alf those people on the bus were evil and they were yelling at me in my mind and God was yelling back at them. And the bus driver was in on it, too, so I couldn't take it being on the bus anymore." (Tr. 570.)

When his parents confronted him, he revealed further delusions:

> Errol, Jr., uh, said to the effect, "That's because you're controlled by demons. There's a purple one sitting on your head right now, Mom. I hate them. Why are you lying to me? You say you love me but you're two-way. There are demons inside there. First you act one way, then another. Your tears don't mean anything." At that point he was limping because he had walked all over town and done something to his ankle. And he said, "I think I broke my ankle." We asked him if he wanted to get medical care for it but he said no. "I know about you and the Al-Quaida. Why are you keeping me prisoner?"

(Tr. 603.) Ultimately, his threats toward his parents resulted in his arrest for intimidation, and a 72-hour involuntary commitment during which he was diagnosed with amphetamine psychosis from the Adderall. (Tr. 613, 1142, 1151.) After his release, his parents rented a rural

house for him because he "just couldn't seem to tolerate being around people very well," and "needed a very quiet environment." (Tr. 543.)

Still, his bizarre behavior resumed. Shortly after his February 2003 release, Mr. Beumel bought a handgun, but soon pawned it at a loss to buy 10 to 15 Bibles, which he distributed at a Hooters restaurant and a tattoo parlor. (Tr. 1457-58.) In March, he professed

> that he was Jesus and . . . he had talked about things like there's a world conspiracy with, uh, President Bush and the Queen of England and the Pope to, some sort of evil conspiracy . . . [A]nd things like there were CIA agents in white vans all over town listening to us and watching us . . . [and] "I'm not your son. Carly, my sister, and I are aliens."

(Tr. 545-46.) When the extended family gathered for Easter and Mr. Beumel's birthday (April 20 and 21, 2003, respectively), he and his sister went for a drive where "he took [her] to a cemetery and said that this is where he wanted [her] to have him buried," because "he hadn't been feeling well and he didn't think that he would be here that much longer." (Tr. 1384-85.)

Then on April 25, 2003, Mr. Beumel listened to one of his R.A. West recordings, and described:

> I just kept going back and forth. "Am I supposed to do this", you know, and I kept hearing, "You got to do it. It's right." "Am I supposed to do this?" And I put on one of my Brother West CDs. . . . I hit play and he said, "You gotta go." And I, I thought, you know, I pushed stop and, "All right. Well, I gotta go", you know.

(Tr. 1481-82.) He took those words to mean "that I have to kill my dad." (Tr. 1482.) When Mr. Beumel's parents came to his home about 11:00 p.m. that night to check on him, Errol Sr. came to the door, and Mr. Beumel shot him six times. (Tr. 527.) Errol Sr. staggered across the road to a ditch, where Mr. Beumel followed him with a flashlight and a second clip of ammunition, and fired six more shots. (Tr. 528.) The police arrived shortly thereafter – and while riding in the patrol car after his arrest, "as [they] drove past the White Castle restaurant, [Mr. Beumel] asked to stop for hamburg –, for food there at the White Castle." (Tr. 1089.)

3. ***Procedural History.*** Mr. Beumel was charged with murdering Errol Sr., and raised an insanity defense. Every mental-health expert witness who examined Mr. Beumel agreed that he is now mentally ill (*see generally* Tr. 52, 1348-49, 1716-18, 1937-42); and all but one agreed he was insane during the shooting. (Tr. 1912, 1937; *but see* Tr. 1761-62.) However, the jury rejected his defense and returned a guilty verdict (Tr. 2039-40), and the court proceeded to sentencing.

The sentencing procedure was unusual because Mr. Beumel's offense and trial straddled the *Blakely* fence: Because the offense occurred before *Blakely*, Mr. Beumel's sentence was substantively controlled by Indiana's pre-*Blakely* sentencing statutes. But by the time of trial, those statutes had been invalidated on *Blakely* grounds. *See Smylie v. State*, 823 N.E.2d 679 (Ind. 2005). Therefore, the trial court had to improvise a jury fact-finding procedure for finding aggravating factors under the old statutes.

Under that procedure, the jury was asked to consider a special verdict form (App. 35-37) for 21 purported "aggravators" (facts that, if found by the jury beyond a reasonable doubt, would raise the *Apprendi* "statutory maximum" sentence under Indiana's then-existing sentencing statutes). These factors were based on a list the State filed prior to trial. Mr. Beumel objected that the list violated his Due Process rights under the Sixth Amendment and *Blakely*, because it was cumulative, derivative, and too vague to put him on notice of the State's sentence-enhancing allegations and let him prepare a meaningful defense, App. 40, 47-49. But over his objection, Tr. 2044-45, 2048-49, the sentencing-phase jury was allowed to consider all 21 aggravators – and returned a verdict finding all 21 true. App. 35-37. Based on those aggravators – and finding no mitigators, not even mental illness – the trial court sentenced Mr. Beumel to 70 years, the maximum permissible under Indiana law. App. 31.

On appeal, Mr. Beumel argued the cumulative, redundant aggravators violated Due Process and *Blakely*, poisoning the jury's sentencing-phase deliberations. (Appellant's Brief pp. 24-28.) However, the Indiana Court of Appeals deemed the error harmless, "fail[ing] to see *jury* prejudice where the *court* imposed defendant's sentence." App. 14, 16 & n. 1 (emphases added). Mr. Beumel then petitioned the Indiana Supreme Court to review the intermediate court's decision, but the high State court denied that petition by a 4-1 vote. App. 33-34. Mr. Beumel now respectfully petitions this Court for a writ of *certiorari*.

ARGUMENT

This case typifies State trial courts' difficulties in implementing *Blakely*. These compelling test facts – particularly if consolidated with other cases raising similar issues – offer this Court a useful vehicle for establishing clear rules for constitutionally instructing a post-*Blakely* sentencing jury.

Blakely amplified *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), establishing that under the Sixth Amendment, a sentence may not be increased based on facts not admitted by the defendant or reflected in the jury's verdict, unless the additional facts are also pleaded and proved to a jury beyond a reasonable doubt. *Blakely*, 542 U.S. at 303-04. Despite having been foreshadowed by *Apprendi* and *Ring*, the States were seemingly caught unaware by *Blakely* – it has been described as an "earthquake which has shaken the foundation of structured sentencing reforms." Douglas A. Berman, *Conceptualizing* Blakely, 17 FED. SENTENCING REP. 89, 94 n. 2 (2004).

Mr. Beumel is one of the defendants harmed in the State-level aftershocks of that "earthquake," as trial courts and legislatures have scrambled with varying degrees of success to implement *Blakely*. In his case, the Sixth Amendment was honored in form, but not substance, in two ways – foremost, by repeating a single real aggravator multiple times, unduly emphasizing the legitimate one; but also by requiring the jury to determine issues beyond lay jurors' competence.

I. Repetitive Jury Instructions on Sentencing Questions Violate the Sixth Amendment.

The most glaring defect in the sentencing phase of Mr. Beumel's trial was that the jury was asked to consider a redundant list of derivative aggravators – all but ensuring that, having been reinforced by repetition, the jury would deem all of them proven beyond a reasonable doubt. Specifically, of the 21 aggravators, only 9 reflected discrete concepts – and three of those were listed in twelve different ways:

- First, "history of criminal or delinquent activity" (an enumerated aggravating factor under Ind. Code § 35-38-1-7.1(b)(2) (2003)) was rehashed three more times as (1) "[s]hort-term incarceration did not deter the defendant from commission of further crime," (2) his "history of contacts with police for violence and unruly behavior," and (3) his prior "altercations with and threats and violence towards his parents." App. 36.

- Second, "the nature and circumstances of the crime committed" (itself legitimate under Ind. Code § 35-38-1-7.1(a)(2)) was resurrected *six* times as (1) "brutality of the crime," (2) the victim's "defenseless[ness]," (3) the shooting's "senseless and disturbing nature," (4) Mr. Beumel "purposefully took drugs before the Murder [*sic*]," (5) that Mr. Beumel "committed crimes while on bond," and (6) the ultimate judgment that "[t]he crime was among the worst of offenses in the nature of its commission." App. 35-36.

- Third, Mr. Beumel's "character," itself a proper consideration under Ind. Code § 35-38-1-7.1(a)(3)(B), gave a *redux* under the caption "drug and alcohol abuse."

None of the repetitive variants of those issues were set out by any statute – and though they would have been a proper basis for *argument* to the jury as grounds for finding the ultimate statutory aggravator, it offends the Sixth Amendment to embed such argument in the guise of a "neutral" special-verdict form.

Presenting sentencing issues to a jury fails of its essential Sixth Amendment purpose when, as here, the questions themselves are framed to preordain a particular answer – making any nominal "deliberation" of those factors by a jury of Mr. Beumel's peers a mere charade. Accordingly, what might at first blush appear to be ordinary instructional error under State law, under these circumstances, is of Constitutional dimension, warranting this Court's intervention.

The poisonous effect of such undue repetition to a jury is well established. Recent scholarly writing has raised it as a particular concern in the post-*Blakely* context, noting it as one of "the cognitive and deliberative biases that will hamper jury performance in finding sentencing facts." J.J. Prescott and Sonja Starr, *Improving Criminal Jury Decision Making after the* Blakely *Revolution*, 2006 U. Ill. L. Rev. 301, 303 (hereafter, "Prescott & Starr").

"The answers jurors . . . reach are heavily influenced by the way questions are posed to them," and "[o]verly numerous or poorly phrased or ordered questions and answer choices can exacerbate various kinds of cognitive biases." Prescott & Starr, 2006 U. Ill. L. Rev. at 325. For

example, "[b]ecause of the decoy effect, prosecutors would have a strong interest in adding options to the [special verdict] form that suggest the offense is *more* aggravated than they can reasonably prove" - not because "it convinces jurors to pick the decoy [options], but rather that it distorts their choices among the other options." *Id.* at 330, 332 (emphasis original), *citing* Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about* Apprendi, 82 N.C. L. REV. 621, 655-59 (2004) and Neil Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 J. PERSONALITY & SOC. PSYCHOL. 211, 215 (1972). Accordingly, it is an "essential aspect of post-*Blakely* jury reform . . . to devise means both to reduce the complexity of juries' tasks and to give juries the best possible tools for managing complexity." *Id.* at 334.[1]

Here, the undue repetition of aggravators likely egged the jury on to find *more* aggravators than they otherwise would have – especially since they were not similarly presented with mitigators like Mr. Beumel's serious mental illness, which would have helped "anchor" the jury to a less-extreme position. As Prescott & Starr note, "[i]ndividuals and groups tend to reach erratic and arbitrary conclusions when they are asked to provide some measure of the seriousness of wrongdoing but are not provided a bounded scale. . . . In general, people make

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[1] Indeed, even before the era of modern social science, the Indiana judiciary had itself intuited that repetition of a particular point to a jury eventually becomes improper argument by the court through overemphasis. *E.g.*, *Robbins v. Fugit*, 189 Ind. 165 (1920) (giving fourteen or fifteen instructions on undue influence in a will context was needless repetition amounting to argument by the court which may mislead the jury).

judgments based on adjusting from a base anchor, and if the anchor is absent or poorly chosen, it may distort decisionmaking." Prescott & Starr, *supra*, at 325, *citing* Cass R. Sunstein *et al.*, *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1157-59 (2002), Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 976 (2005), and R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 765 (2001).

Such pervasive deliberative bias is not rendered harmless (as the Indiana Court of Appeals seems to have concluded) just because a *judge* ultimately imposes sentence based on the *jury*-found facts. To the contrary, *Blakely* makes the jury's findings of aggravators, whether many or few, binding on the sentencing judge. Thus, skewing what goes *into* the judge's sentencing calculus will inevitably skew what comes *out*. (For one obvious example, if the jury would have been inclined to find *zero* aggravators, had the list not been repetitive and argumentative, the judge could not have imposed a sentence longer than 60 years – a decade less than Mr. Beumel received.)

Thus, the repetitive list of aggravators in Mr. Beumel's case caused an identifiable harm, and violated long-recognized and well-established principles for guiding jury deliberations. That error has Sixth Amendment dimensions in the post-*Blakely* legal landscape, when it taints the jury's ability to fairly and neutrally assess the culpability of an act – thereby skewing the critical determination of how long the State will be permitted to deprive a defendant of his or her liberty. If courts are

permitted to frame jury questions in a way that preordains the decision, the basic jury right guaranteed in *Blakely* would be rendered a "mere procedural formality," rather than "a fundamental reservation of power in our constitutional structure." *See Blakely*, 542 U.S. at 305-06.

II. Allowing a Jury to Consider Sentencing Questions Beyond a Lay Jury's Competence Violates the Sixth Amendment.

Two other aggravators submitted to the jury were also improper for a different reason: they were entirely beyond the competence of a lay jury to determine, thus inviting erratic, irrational, and arbitrary verdicts, and again violating the basic Sixth Amendment purpose of a sentencing jury.

First, without being given mitigating factors to consider or having any reference point for comparison, the jury was asked whether "the crime committed in this case and the offender were among the worst of offenses and offenders as demonstrated by the nature, extent and depravity of the offense and what it reveals about the defendant's character." App. 35-36. And second, the jury was asked whether Mr. Beumel "needs to be within the control of the Department of Corrections for a period of time greater than the presumptive sentence." App. 36.

However, lay juries simply are not equipped to assess the large-scale culpability of either a particular offense or a particular offender, because of "jurors' lack of experience – jurors essentially consider each case in a vacuum, while judges can use previous cases as points of comparison. Harshness, as well as unpredictability, may be a function of inexperience, as jurors may 'overreact' to routine offenses."

Prescott & Starr, 2006 U. Ill. L. J. at 327, *citing* Jeffrey Rachlinski & Chris Guthrie, *Heuristics and Biases among Experts*, 2004 AM. L. & ECON. ANN. MEETING at 37 (2004) (available at http://law.bepress.com/cgi/viewcontent.cgi?article=1059&context=alea); Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 913-16 (2004). More specifically,

> Jurors asked whether to characterize a particular offense as aggravated will typically have little experience evaluating other instances of the same offense. To most law-abiding citizens, for instance, almost any homicide case taken in isolation might seem "excessively brutal" or "deliberately cruel." Thus, juries will tend to be arbitrary and perhaps overly severe in their assessments of aggravating factors if no points of comparison are provided.

Prescott & Starr, *supra*, at 328, *citing Maynard v. Cartwright*, 486 U.S. 356, 364 (1988) ("[A]n ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous'.").

Accordingly, there was no realistic prospect of a lay jury being able to reach a reasonable or rational decision on those two aggravators – though after the repetitive emphasis placed on the other aggravators discussed in Part I., *supra*, it was all but assured that this jury would irrationally reach the conclusion *adverse* to Mr. Beumel on those points. But the jury-trial right vindicated in *Blakely* is hollow unless the jury is empowered to make a *reasonable* choice – which, in turn, requires that jurors only be called upon to answer questions within their rational expertise. Otherwise, they will inevitably make arbitrary, and generally overly-severe, judgments that fail of their essential Sixth Amendment purpose.

III. This Court's Intervention Is Required to Establish the Basic Substantive Requirements to Implement Jury Sentencing Under *Blakely*.

As set forth above, these fundamentally defective aggravators rendered Mr. Beumel's Sixth Amendment *Blakely* rights meaningless, presenting an issue appropriate for this Court's review. The issue, then, is whether these facts provide this Court an appropriate vehicle for refining the practical requirements of *Blakely*'s mandate.

In a word, the answer is yes. Just as this Court in 1966 decided *Miranda* because the State-level dust had not yet settled from *Escobedo* two years earlier, this case illustrates how local trial courts' best efforts to implement *Blakely* have proven ineffective – even counterproductive – to the Sixth Amendment right that *Blakely* aimed to advance.

Even after *United States v. Booker*, 543 U.S. 220 (2005) expounded on *Blakely* in the context of the Federal Sentencing Guidelines, commentators suggest that "[b]eneficial change will require further developments in [this Court's] Sixth Amendment jurisprudence" Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Sentencing Reform*, 58 STAN. L. REV. 235, 259 (Oct. 2005); and that "[i]n the meantime, *Booker* reveals more questions than it answers." Kathleen H. Morkes, *Where Are We Going, Where Did We Come From: Why the Federal Sentencing Guidelines Were Invalidated and the Consequences for State Sentencing Schemes*, 4 AVE MARIA L. REV. 249, 286 (Winter 2006).

Accordingly, the "*Blakely* revolution" (*e.g.*, Prescott & Starr, *supra*, at 345) has proven to require the same extremely-specific, practical guidance in the Sixth Amendment context that *Miranda*'s now-famous "script" provided for the Fifth Amendment. Specifically, this case

presents the opportunity to establish three simple, bright-line rules to guide *Blakely* jury deliberations.

First, Mr. Beumel's case shows the need for a rule that any aggravators presented to a jury must be specifically enumerated by statute. Since legislatures could necessarily only draft aggravators of general applicability, such a rule would ensure that case-specific factual arguments would remain just that – mere *arguments* – and not be carried back to the jury room in repetitive black-and-white to taint its deliberations on the ultimate aggravator at issue. Such a rule finds support from both common sense, *e.g.*, *Robbins*, *supra* at n. 1, and research indicating that trumped-up lists of aggravators lead juries to irrational decision making based on the "decoy effect." Prescott & Starr, *supra*, at 332.

Second, this case illustrates that *Blakely* juries should be charged with deciding mitigators as well as aggravators. Since mitigators are beneficial to a defendant, jury factfinding on those points does not carry the same Sixth Amendment import in its own right; and it would remain appropriate for sentencing judges to find mitigators beyond any that may be reflected in the jury's verdict. However, the process of at least *submitting* them to the jury provides a necessary "anchor" to counterbalance what otherwise is an entirely-lopsided list of condemnatory factors. Providing an anchor at each end of the sentencing-fact spectrum promotes intelligent decision-making. Prescott & Starr, *supra*, at 326.

Finally, Mr. Beumel's case reveals the need for a clear-cut rule that *Blakely* juries may not be invited to render opinions on a particular defendant's culpability in relation to such cases as a category – here, questions posed as

whether Mr. Beumel was among the worst of offenses and offenders, and whether he deserves a longer prison term than the ordinary statutory maximum. Again, such determinations are beyond a lay jury's expertise, and tend to provoke arbitrary and overly-severe results because the jury has no relevant points of comparison. *Id.* at 328.

Other cases presented to this Court on petitions for *certiorari* may also point to the need for other related bright-line rules. In that event, consolidating Mr. Beumel's case with others of a similar type will provide this Court an even greater opportunity for a comprehensive follow-up to *Blakely* and ensure that all State-court defendants receive a uniform, meaningful trial by jury on sentencing facts. The Sixth Amendment requires no less.

CONCLUSION

For all of the foregoing reasons, Petitioner Errol D. Beumel, Jr. respectfully prays this Court for a Writ of *Certiorari* to the Indiana Supreme Court.

Respectfully submitted,

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IN THE
COURT OF APPEALS OF INDIANA

ERROL D. BEUMEL, JR., Appellant-Defendant,	)	
vs.	)	No. 79A04-0601-CR-18
STATE OF INDIANA, Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0304-MR-1

DECEMBER 28, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

HOFFMAN, Senior Judge.

Defendant-appellant Errol Beumel, Jr., appeals his conviction by jury of murder and using a firearm in the commission of an offense as well as the 70-year sentence imposed thereon. We affirm.

Defendant raises three issues, which we consolidate and restate as:

I. Whether there is sufficient evidence to support his convictions; and

II. Whether the trial court erred in sentencing him.

The facts most favorable to the verdict reveal that Errol Beumel, Sr., and his wife, Janet, had three children. Defendant, their only son, was born on April 21, 1978. After graduating high school, defendant attended Purdue University, where his father taught mathematics. Defendant was an outgoing and friendly A-B student until his girlfriend of five years broke up with him in 2001. After the break-up, defendant became withdrawn and began to associate with drug users. One of these associates told defendant how to trick Lafayette psychiatrist Dr. Aldo Buonanno into prescribing him Adderall, an amphetamine and schedule II controlled substance.

At a March 2001 appointment with Dr. Buonanno, defendant told the doctor that he had difficulty concentrating and sleeping and had taken Adderall in the past. Dr. Buonanno referred defendant to Dr. Jill Salem for psychological testing. Dr. Salem concluded that defendant's test results were consistent with attention deficit disorder, and Dr. Buonanno prescribed defendant 5 milligrams of Adderall twice daily. By September 2001, the doctor had increased defendant's Adderall to the maximum dose of 20 milligrams three times per day. Further, defendant frequently called the doctor and requested additional Adderall. For example, defendant told the doctor his pills had been stolen from his truck, he had washed his pants with the pills in the pocket, and the pharmacy had not given him enough pills when it filled the prescription.

During the summer of 2002, defendant met Brandi Maddox on the internet and invited her to stay with him at his parent's home. The Beumels did not approve of Maddox, who at some point returned to her home in Kentucky and was subsequently incarcerated. This disapproval became an ongoing source of tension for the defendant and his parents. At some point, defendant apparently learned that his parents were not giving him Maddox's daily love letters.

In October 2002, defendant was admitted to the hospital with an irregular heartbeat, which was related to defendant's use of Adderall. Although defendant stopped taking the drug while he was in the hospital, he began taking it again shortly after his discharge. The following month, defendant met Pearl Turner, his sister's mother-in-law. Pearl was a Pentecostal Minister who belonged to a church in West Virginia. After meeting Pearl, defendant began listening to religious tapes and reading the Bible for days at a time without sleeping.

Over the course of the next few months, the tension between defendant and his parents escalated. In addition to their conflict about Maddox, defendant believed his parents were withholding money from him. He was also angry that his parents confiscated his gun collection. On January 26, 2003, defendant demanded money from his parents and threatened to kill them. The following day, he attacked his father in his father's car, took his father's wallet, and pushed his father out of the car. That night, the Beumels left their home to stay in a hotel because they were scared of defendant.

On January 28, 2003, defendant went to his parents' house demanding his guns. Defendant ran over his parents' mailbox, damaged their yard, and threatened to kill them several times. The police were dispatched to the Beumels' home and arrested defendant, who was subsequently charged with intimidation. After this incident, the Beumels contacted Dr. Buonanno, who signed an emergency detention order and helped arrange defendant's admission to Methodist Hospital in Indianapolis.

At Methodist, defendant was diagnosed with a drug-induced psychosis consistent with Adderall abuse. After five days at Methodist, defendant began eating, sleeping, and thinking clearly again. When defendant's psychosis cleared, he was discharged to Home Hospital in Lafayette under Dr. Buonanno's care. When defendant was released from Home Hospital, Dr. Buonanno told defendant that he no would longer prescribe him Adderall. Defendant discarded the Adderall that he still had and considered having his name placed on a DEA list so he could no longer have access to Adderall. Further, in an effort to alleviate the tension between him and his parents, defendant moved out of his parents' home and into his own house.

Concerned about the pending intimidation charge for which he was out on bond, defendant asked Dr. Buonanno to provide him with a written statement that he was unable to appreciate the wrong of his actions on January 28, 2003, when he damaged his parents' yard and threatened to kill them. Doctor Buonanno complied with defendant's request and sent defendant's attorney a note stating that at the time of the offense defendant was "suffering from a mental illness and could not appreciate the wrongfulness of his actions. He was mentally unstable." State's Exhibit 52.

At some point after Dr. Buonanno wrote this note and refused to prescribe Adderall for defendant, defendant asked his primary care physician for a prescription for Adderall. When the doctor refused to give defendant a prescription, defendant went to another doctor as a new patient and got a 30-day supply of the drug. Eleven days later, defendant called the new doctor's office to report that he had washed his pants with the Adderall in his pockets and needed more of the medication. The doctor gave him an additional 30-day supply as well as another refill the following month.

On his April 21, 2003, birthday celebration at his parents' home, defendant was agitated and confrontational. He told his parents he could burn down their house and kill them. Four days later, on April 25, 2003, the Beumels went to defendant's house to check on him because they were concerned about his recent behavior. Mr. Beumel went to the front door while his wife waited in the car. Defendant, who had been taking Adderall all day, opened the front door with a gun in his hand and asked his father for money. Defendant then told his father to get on his knees and fired six shots at him. Mr. Beumel turned and ran across the road and fell into a ditch. His wife, a critical care nurse, ran to his side and began performing first aid while she called 911.

While his mother was attempting to save his father's life, defendant ran into the house to find a flashlight and more bullets. He went back outside, approached the ditch where his father had fallen, told his mother to move out of the way, and shot his father six more times. Mrs. Beumel watched as her husband raised his hand to block the final shot. Defendant then turned and walked back to his house.

When Tippecanoe County Sheriff's Department deputies arrived at the scene, defendant was cooperative, calm, and compliant. He recognized one of the deputies who had transported him to Methodist Hospital in January and remembered that the deputy had refused defendant's request to stop at White Castle during the trip to Indianapolis.

Defendant was transported to the Tippecanoe County jail where he was interviewed an hour after the shooting. During the interview, the defendant remained calm and cooperative. He joked around with the deputy that interviewed him and exhibited no mental impairment. He was able to clearly recall the shooting and told the deputy that he had had problems with his father for years. When the deputy later told defendant that his father had died, defendant responded that "shit happens." Transcript at 729. Defendant was still calm and cooperative the following day when another deputy interviewed him.

Defendant was charged with murder and using a firearm in the commission of an offense. He raised an insanity defense. At trial, the evidence revealed that six hours after the shooting, defendant had 331.4 nanograms of amphetamines per milliliter of blood in his system. This is eight times the prescribed dosage of Adderall. Psychiatric Clinical Pharmacy Specialist Dr. Carol Ott testified that at the time of the shooting, the concentration of Adderall in the defendant's system was probably even higher. She further explained that 200 nanograms of amphetamines per milliliter of blood is a toxic level, and that 500 to 1000 nanograms of amphetamines per milliliter of blood can cause death.

Dr. Ott also explained that symptoms of Adderall abuse include agitation, irritability, anxiety, tremors, hallucinations, paranoia, and insomnia. According to Dr. Ott, the addictive qualities relate to the euphoric effects that the drug provides, and when patients stop taking Adderall in excessive doses, their psychotic symptoms clear up relatively rapidly.

Also at trial, Dr. John Pless testified that Mr. Beumel died from multiple gunshot wounds. Specifically, Dr. Pless testified that ten gunshots hit the victim. Eight of the ten bullets passed through Mr. Beumel's body and two grazed him. In addition, the State admitted into evidence the following letter that defendant wrote to Dr. Buonanno after the shooting:

> Hello, Dr. B. I was needing a letter written for me stating I was not in my right mind during the time of the shooting of my dad. Like the letter you wrote me in January of 2003. I would greatly appreciate it. I don't know when my court dates are for murder, but during the shooting incident I was overdosed on . . . Adderall, and also hearing demonic voices in my mind. Thank you. . . . Please send your letter to me at Tippecanoe County Jail. . . .

State's Exhibit 53. Dr. Buonanno refused to write this letter.

In support of his insanity defense, defendant testified that he had not slept the week before he killed his father because he was taking so much Adderall. He further testified that at the time of the murder he was "overpowered by a Satanic Force." Transcript p. 1496. In the State's rebuttal, Dr. Michael Welner, a forensic psychiatrist who is board certified in psychiatry, forensic psychiatry, and

clinical psychopharmacology, testified that he reviewed 95 sources of information and spent more than 20 hours with defendant. As a result of his document reviews and interviews with defendant, Dr. Welner concluded that defendant's conflict with his parents over Brandi Maddox, finances, and his gun collection, intensified by defendant's dependency on Adderall, led defendant to kill his father. According to Dr. Welner, at the time defendant killed his father, defendant appreciated the wrongfulness of his actions and was legally sane. Dr. Welner further explained that defendant was demonstrating the effects of an acute Adderall intoxication at the time of the offense, and that no mental illness manifested itself until defendant had been incarcerated for some time.

In contrast, court-appointed expert Dr. Martin Abbert, who spent four hours with defendant and did not review any of his medical records, testified that defendant suffered from paranoid schizophrenia and was legally insane at the time of the offense. In addition, the second court-appointed expert, Dr. Stephen Berger, who spent two and one-half hours with defendant, also testified that defendant was legally insane at the time of the offense. Specifically, Dr. Berger explained that defendant suffered from substance-induced psychosis resulting from six years of drug abuse.

The jury rejected defendant's insanity defense and convicted him of murder and use of a firearm in the commission of an offense. The jury also found sixteen aggravators beyond a reasonable doubt. In its eight-page written sentencing order, the trial court noted that several of the aggravating factors found by the jury were related to each other. The court then found three aggravating factors and used several of the jury's factors in support of

its three aggravators. For example, the court first found that the nature and circumstances of the crime was an aggravating factor. The court then explained that the following aggravators found by the jury supported this factor: the brutality of the crime, Mr. Beumel was unarmed and attempted to flee, defendant violated the trust in the parent-child relationship, the murder was a premeditated execution, defendant followed his father to the ditch with a flashlight that he used to illuminate the victim and shot him again, and the victim's wife and defendant's mother was attempting to give first aid to the victim when the defendant fired the final shots.

The court next found that the defendant's drug abuse and related conduct was the second aggravating factor. In support of this aggravating factor, the court pointed to the following aggravating factors found by the jury: defendant's willful and purposeful abuse of Adderall, defendant refused to take steps to deal with his drug problems, and defendant exploited one or more physician/patient relationships. The court further pointed out that defendant had a prior arrest and heart problems related to his Adderall abuse but continued to fraudulently obtain Adderall, showing that he knew his drug use was self-destructive but continued with it anyway.

Lastly, the court found that defendant's history of criminal activity was the third aggravating factor. In support of this aggravating factor, the court pointed to the following aggravating factors found by the jury: defendant murdered his father while on bond for the intimidation of both parents, defendant had a history of police contacts because of his violent and unruly behavior, and defendant had a history of threatening his parents.

The court stated that it gave the greatest weight to Dr. Welner's testimony and rejected the defendant's age, lack of criminal convictions, and mental illness as mitigating factors. After finding that the aggravating factors outweighed the mitigating factors, the court sentenced defendant to the maximum sentence of 65 years for murder and 5 years for using a firearm in the commission of the offense. The court ordered the two sentences to run consecutively for a total sentence of 70 years.

Defendant first argues that there is insufficient evidence to support his convictions. Specifically, he contends that his convictions cannot be upheld because the evidence supports the conclusion that he was legally insane at the time of the offense. Because defendant admits committing the offense, the only issue before us is whether the record of the proceedings supports the jury's verdict that the defendant was guilty rather than not guilty by reason of insanity.

Pursuant to Ind. Code Section 35-41-3-6(a), "[a] person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of his conduct at the time of the offense." This section defines "mental disease or defect" as "a severely abnormal mental condition that grossly and demonstrably impairs a person's perception, but the term does not include an abnormality manifested only by repeated unlawful conduct or antisocial conduct." Ind. Code § 35-41-3-6(b).

The "insanity defense" is an affirmative defense for which the burden of proof is on the defendant. *Thompson v. State,* 804 N.E.2d 1146, 1148 (Ind. 2004). The State must prove the offense, including the *mens rea,* beyond a

reasonable doubt but need not disprove insanity. *Id.* (citing Ind. Code § 35-41-4-1). To avoid responsibility for the crime proven by the State, the defendant must establish the insanity defense by a preponderance of the evidence. *See* Ind. Code § 35-41-4-1(b). The question of whether a defendant can appreciate the wrongfulness of his conduct is one for the trier of fact. *See Thompson,* 804 N.E.2d at 1149. A defendant who claims that his insanity defense should have prevailed at trial is in the position of one who is appealing from a negative judgment, and we will reverse when the evidence is without conflict and leads only to the conclusion that the defendant was insane when the crime was committed. *Id.* As such, we will not reweigh the evidence or assess the credibility of witnesses but will consider only the evidence most favorable to the judgment and the reasonable and logical inferences to be drawn therefrom. *Id.*

Here, defendant's sole contention is that "the incredibly dubious testimony of a single expert witness was insufficient to rebut [defendant's] insanity defense and justify a guilty verdict." Appellant's Brief, p 22. Under the incredible dubiosity rule, a court will impinge on the jury's responsibility to judge the credibility of witnesses only when it is confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. *White v. State,* 846 N.E.2d 1026, 1032 (Ind. Ct. App. 2006), *trans. denied,* (citing *Stephenson v. State,* 742 N.E.2d 463, 497 (Ind. 2001), *cert. denied.*) When a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. *Stephenson,* 742 N.E.2 [sic] at 497-98. However, we have recognized that the application of this rule is rare and is

limited to cases where the sole witness' testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. *Id.*

In support of his argument, defendant focuses this court's attention on the contradictions between Dr. Welner's testimony and that of Drs. Abbert and Berger as well as the inherent probability that any reasonable person could believe Dr. Welner's conclusion that defendant was legally sane at the time he killed his father. Nevertheless, we find the incredible dubiosity rule to be inapplicable. As we have previously clarified, the standard for incredibly dubious testimony is inherent contradiction in the testimony of one witness, not contradiction between the testimony of two or more witnesses. *See Stephenson,* 742 N.E.2d at 499. By claiming inconsistent and contradictory testimony between witnesses rather than inherent contradictions within one witness' own testimony, defendant is actually asking us to reweigh the evidence and assess witness credibility. This we cannot do. *See Thompson,* 804 N.E.2d at 1149.

We further note that pursuant to the Indiana Supreme Court's decision in *Barany v. State,* 658 N.E.2d 60, 64 (Ind. 1995), even if the medical experts were to have unanimously agreed that defendant was insane at the time of the offense, the jury's guilty verdict would still be proper on these facts. In *Barany,* the Supreme Court upheld a conviction notwithstanding unanimous expert opinion that the defendant was insane at the time he killed his live-in companion. *Id.* There, neighbors saw Barany sitting naked on the end of a pier. When his companion placed a blanket on him, Barany bit off her finger. Barany then followed her back to the house, shot

her eight times, struck her with a splitting maul, and destroyed several household appliances with the maul.

At trial, three court-appointed psychiatrists testified that at the time of the murder, Barany was unable to understand the wrongfulness of his conduct. However, a police detective testified that a few hours after the crime, Barany told him that the victim nagged and complained. In addition, one of Barany's friends testified that the Barany "seemed O.K." to him, and Barany's sister testified Barany told her he believed his companion was calling the police at the time he killed her. *Id.* The jury found Barany guilty but mentally ill. *Id.* On appeal, the Indiana Supreme Court upheld the conviction, finding the jury could have decided the lay testimony about Barany's behavior was more indicative of his actual mental health at the time of the killing than medical examinations. *Id.*

Here, defendant asked his father for money, told him to get on his knees, and shot him. As his father ran across the road, defendant went back into the house to find a flashlight and more bullets. He went back outside, approached the ditch where his father had fallen, told his mother to move out of the way, and shot his father six more times. Defendant then turned and walked back to his house. When Tippecanoe County Sheriff's Department deputies arrived at the scene, defendant was cooperative, calm, and compliant. He recognized one of the deputies who had transported him to Methodist Hospital a few months before and remembered that the deputy had refused his request to stop at White Castle. During an interview an hour after the shooting, defendant remained calm and cooperative. He joked around with the deputy that interviewed him and exhibited no mental impairment. He was able to clearly recall the shooting and told

the deputy that he had had problems with his father for years. When the deputy later told defendant that his father had died, defendant responded that "shit happens." Transcript at 729. Defendant was still calm and cooperative the following day when another deputy interviewed him. Here, as in *Barany,* the jury could have decided the lay testimony about defendant's behavior was more indicative of his actual mental health at the time of the killing than medical examinations. There is sufficient evidence to support defendant's convictions.

Defendant further argues that the trial court erred in sentencing him. Sentencing decisions are within the trial court's discretion, and will be reversed only upon a showing of abuse of discretion. *Loyd v. State,* 787 N.E.2d 953, 960 (Ind. Ct. App. 2003). The trial court's sentencing discretion includes the determination of whether to increase presumptive penalties, impose consecutive sentences for multiple offenses, or both. *Haggard v. State,* 771 N.E.2d 668, 676 (Ind. Ct. App. 2002), *trans. denied.* In so doing, the court determines which aggravating and mitigating circumstances to consider, and is solely responsible for determining the weight to accord each of these factors. *Loyd,* 787 N.E.2d at 960. The sentencing statement must: 1) identify significant aggravating and mitigating circumstances; 2) state the specific reason why each circumstance is aggravating and mitigating; and 3) demonstrate that the aggravators outweigh the mitigators. *Id.* We examine both the written sentencing order and the trial court's comments at the sentencing hearing to determine whether the trial court adequately explained the reasons for the sentence. *Id.*

Here, defendant first contends that he "was improperly sentenced based on twenty-one purported aggravators, when at least nine of them were derivative of three basic aggravators. . . ." Appellant's Brief p. 24. However, our review of the trial court's written order reveals that the trial court found three aggravating factors: 1) the nature and circumstances of the offense; 2) defendant's drug abuse and related conduct; and 3) defendant's history of criminal activity. Further, the trial court noted that the sixteen aggravating factors found by the jury were related to the court's three factors as well as to each other. The court then used several of the jury's factors to support its three aggravators. For example, the court cited the following factors in support of the nature and circumstances of the offense aggravator: the brutality of the crime, Mr. Beumel was unarmed and attempted to flee, defendant violated the trust in the parent-child relationship, the murder was a premeditated execution, defendant followed his father to the ditch with a flashlight that he used to illuminate the victim and shot him again, the victim's wife and defendant's mother was attempting to give first aid to the victim when the defendant fired the final shots.

In addition, the court found that the defendant's drug abuse and related conduct was an aggravating factor. In support of this aggravating factor, the court pointed to the following aggravating factors found by the jury: defendant's willful and purposeful abuse of Adderall, defendant refused to take steps to deal with his drug problems, and defendant exploited one or more physician/patient relationships. The court further pointed out that defendant had a prior arrest and heart problems related to his Adderall abuse but continued to fraudulently obtain

Adderall, showing that he knew his drug use was self-destructive but continued with it anyway.

Lastly, the court found that defendant's history of criminal activity was an aggravating factor. In support of this aggravator, the court pointed out the following aggravating factors found by the jury: defendant murdered his father while on bond for the intimidation of both parents, defendant had a history of police contacts because of his violent and unruly behavior; and defendant had a history of threatening his parents. Clearly, defendant was not improperly sentenced based on twenty-one aggravators. His argument therefore fails.[1]

Lastly, defendant contends that his sentence is inappropriate because he is not one of the worst offenders and his is not one of the worst offenses. This court has the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude that the sentence is inappropriate in light of the nature of the offense and character of the offender. *Gornick v. State,* 832 N.E.2d 1031, 1034 (Ind. Ct. App. 2005), *trans. denied.* (citing Ind. Appellate Rule 7(B)). We have previously explained as follows regarding the worst offense and worst offender principle:

> There is a danger in applying [this principle because] [i]f we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. In order to determine whether an offense fits that description, we would be required to compare the facts

[1] Defendant does not challenge the three aggravating factors found by the trial court or the trial court's balancing of aggravating and mitigating factors. Further, we fail to see jury prejudice where the court imposed defendant's sentence.

> of the case before us with either those of other cases that have been previously decided, – or more problematically – with hypothetical facts calculated to provide a "worst-case scenario" template against which the instant facts can be measured. If the latter were done, one could always envision a way in which the instant facts could be worse. In such case, the worst manifestation of any offense would be hypothetical and not real, and the maximum sentence would never be justified.
>
> This leads us to conclude the following with respect to deciding whether a case is among the very worst offenses and a defendant among the very worst offenders, thus justifying the maximum sentence: We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.

Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), *trans. denied.*

Here, with regard to the character of the offender, defendant has a long history of willfully and purposely abusing Adderall despite medical, emotional, and legal consequences and the efforts of his family to help him. These consequences include heart problems, an involuntary commitment to Methodist Hospital for a drug-induced psychosis, and an arrest for intimidation after destroying his parents' property and threatening to kill them. Defendant knew his drug use was both self-destructive and harmful to others but continued to abuse Adderall anyway. *See Bryant v. State,* 802 N.E.2d 486, 501 (Ind. Ct. App.

2004), *trans. denied,* (stating that Bryant's substance abuse was a proper aggravating factor where defendant was aware of the problem but did not take any steps to treat it). Defendant also lied to physicians to obtain large quantities of Adderall and had a history of violent and unruly behavior. Lastly, defendant murdered his father while out on bond for intimidation charges, showing a lack of respect for the law.

With regard to the nature of the offense, we note that defendant's father went unarmed to defendant's house out of love and concern for his son. When he knocked on the front door, defendant opened it with a gun in his hand. Defendant demanded money from his father, told him to get on his knees, and fired six shots at him. Mr. Beumel turned and ran across the road and fell into a ditch. While his mother was administering first aid to his father and calling for assistance, defendant returned to his house to find a flashlight and more bullets. Defendant went back outside, approached the ditch where his father had fallen, told his mother to move out of the way, and shot his father six more times. Mrs. Beumel watched as her husband raised his hand to block the final shot. Defendant then turned and walked back to his house to wait for the police.

Based upon our review of the evidence, we see nothing in the character of this offender of the nature of this offense that would suggest that defendant's 70-year sentence for murder and using a firearm in the commission of an offense is inappropriate.

Affirmed.

MAY, J., and MATHIAS, J., concur.

STATE OF INDIANA	)	
	) SS:	IN THE TIPPECANOE
COUNTY OF TIPPECANOE	)	SUPERIOR COURT

STATE OF INDIANA	)	
	)	CAUSE NO.
v.	)	79D01-0304-MR-1
	)	
ERROL DWAIN BEUMEL, JR.	)	(Filed Dec. 15, 2005)

ORDER OF JUDGMENT AND SENTENCE

The defendant was found guilty by jury verdicts of the crimes of Murder and Using a Firearm in the Commission of an Offense. Judgment is hereby entered on the verdicts of the jury in that respect.

As this was the time for entry of judgment and sentence, the court reviewed the Presentence Investigation Report with the parties. The court further heard evidence and arguments of the parties. The defendant was afforded his right to allocution. The family representative of the victim was given the opportunity to make a verbal recommendation to the court.

Verdict Form. The jury was provided a verdict form for the return of its verdict on the aggravators alleged by the State. An error was made in the form. At the court's request the State had agreed to reduce the number of aggravating circumstances to be presented to the jury from the number which had been included in the State's Notice. The verdict form provided to the jury contained aggravating circumstances that had been stricken by the State from its original Notice. The court notes that both parties agreed on the record to the final instructions and forms of verdict. The evidence in trial sustained the jury's

finding of all of the aggravating circumstances in the verdict form and the defendant suffered no prejudice from the error. The court will not consider the aggravating circumstances upon which the jury was not instructed.

Jury Findings. The jury found these aggravators pursuant to the court's instructions:

1. The brutality of the crime
2. Nature and circumstances of the crime
3. Errol Beumel Sr. was defenseless during the defendant's attack upon him and attempted to flee. The defendant prevented his escape.
4. The defendant's act in committing Murder was senseless and disturbing in that it was committed on Errol Beumel Sr., a person who, by reason of his relationship with the defendant, was especially vulnerable to the defendant. The defendant violated the trust in that relationship.
5. Defendant's drug and alcohol abuse
6. There is a high risk that the defendant will reoffend.
7. Defendant refused to take steps to deal with his supposed problems, including therapy when recommended.
8. The defendant improperly exploited one or more physician-patient relationships.
9. Short-term incarceration did not deter the defendant from commission of further crime.
10. Defendant's history of criminal activity
11. Defendant committed crimes while on bond.
12. Defendant's history of contacts with police for violence and unruly behavior

13. Defendant's altercations with and threats and violence towards his parents
14. The character of the defendant
15. Defendant's lack of remorse and failure to accept responsibility for the Murder of his father Errol Beumel Sr.
16. An aggravated sentence is recommended by the next of kin.

Judgment is entered on the jury's verdict with respect to the aggravators noted.

Recommendation of Family Representative. In determining the weight to give the aggravators, the court is cognizant of the recommendation of the family representative who was the wife of the victim and mother of the defendant and was an eyewitness to the Murder. The court understands her recommendation to be that the heaviest possible sentence should be imposed for the reason that the defendant is extraordinarily dangerous. She and other family members also want the court to take such steps as possible to get the defendant mental health treatment. The court believes that the recommendation of the family representative is reasonable.

AGGRAVATING FACTORS

The court notes that several of the aggravators are related to others on the list and will determine weight by considering them with the others that are related.

Nature and circumstances of the crime. The nature and circumstances of this crime are far graver than the court ordinarily encounters in the offense of Murder. In

this respect the court also considers and gives great weight to certain other aggravators found by the jury:

- The brutality of the crime
- Errol Beumel Sr. was defenseless during the defendant's attack upon him and attempted to flee. The defendant prevented his escape.
- The defendant's act in committing Murder was senseless and disturbing in that it was committed on Errol Beumel Sr., a person who, by reason of his relationship with the defendant, was especially vulnerable to the defendant. The defendant violated the trust in that relationship.

The victim Errol Beumel Sr. was the father of the defendant. The victim and the victim's wife – the defendant's mother – were the defendant's sole support and expended considerable effort to look after the defendant and his welfare. On the night of the Murder the victim and his wife went to the defendant's residence to see if he was all right. The victim was unarmed and unsuspecting. The defendant had been to the victim's house earlier that night to kill the victim but the victim was not home. When the victim arrived at the defendant's residence late in the evening, the defendant was armed with a pistol and probably a sizable and very dangerous knife. A reasonable conclusion from the evidence is that the defendant intended to return to the victim's house that night at a time that the victim had returned home to kill him then. The defendant did not have to go back to the victim's home because the victim came to the defendant's house.

The murder was a premeditated execution. The defendant told the victim to get on his knees and, when the victim did not and started to leave, the defendant shot him several times. He followed the victim into the yard as the

victim tried to get away. The victim collapsed in a ditch across the road. The defendant went into his house, composed himself, reloaded and returned to area of the ditch with a flashlight, which he used to light the victim. Then the defendant fired the final bullets into the victim. It appears that one of the final shots was one to the victim's cheek that exited the top of his head. The victim's wife was trying to help for the victim and give CPR until she was told to back away as the defendant fired the final shots.

Drug Abuse and Related conduct. The defendant willfully and purposely abused the drug Adderall and others to the extent that he became psychotic at times. In light of the totality of the facts and circumstances of this case, this factor is a very serious aggravator, especially in relation to these aggravating factors found by the jury:

- Defendant's drug and alcohol abuse
- There is a high risk that the defendant will re-offend.
- Defendant refused to take steps to deal with his supposed problems, including therapy when recommended.
- The defendant improperly exploited one or more physician-patient relationships.
- Defendant's altercations with and threats and violence towards his parents
- Short-term incarceration did not deter the defendant from commission of further crime.
- Defendant's lack of remorse and failure to accept responsibility for the Murder of his father Errol Beumel Sr.

Of the expert witnesses, there is no question that Dr. Michael Welner's analysis should be given the greatest weight in evaluating the defendant. His report, which was placed in evidence in trial, is incorporated here by reference and included in the court's findings. Dr. Welner diagnosed the defendant as having Adderall Dependence. Dr. Stephen Berger held the opinion that the defendant had voluntarily consumed drugs to the point of becoming psychotic at times. The defendant was hospitalized in January and February 2003 at Methodist Hospital in Indianapolis and Home Hospital in Lafayette because of behavior related to drug intoxication and drug-induced psychosis. Further therapy was recommended and the defendant lied about his willingness to take part in therapy post-hospitalization.

The defendant did not enter therapy. The defendant lied in letters and representations to a court, his lawyer and his parents about his intentions to set a new course for himself after the hospitalization when in fact he was purposefully continuing on a course similar to the one that led to his aberrant behavior in January 2003 and resulted in an Emergency Detention Order and a charge of Intimidation in Tippecanoe Superior Court No. 5, on which he was incarcerated for a short time. On the day of his arrest on the Intimidation charge, the defendant was most likely exhibiting the effects of acute drug intoxication to the extent that he was psychotic. The evidence leads to the conclusion that the drug being abused at that time was Adderall. On the day of his arrest and for several days before that he had engaged in threatening and frightening conduct towards his parents.

Based upon her treatment of the defendant in Methodist Hospital at the end of January and beginning of February

2003, Dr. Anne Gilbert, a psychiatrist, diagnosed the defendant's [sic] as having had a drug-induced psychosis.

Post-hospitalization, the defendant again sought out and consumed Adderall and other drugs both by prescriptions obtained fraudulently and buying drugs illegally. He bought guns. He continued to be unemployed and dependent on the victim and his mother.

Although the defendant testified to and also described in interviews attempts to change his pattern of behavior after he left the hospital, he did not continue on that course if in fact he ever actually tried to change.

In the Spring 2001, defendant had fraudulently obtained prescriptions for Adderall from Dr. Aldo Buonanno, a psychiatrist, so that he could supplement the Adderall he was obtaining illegally. The defendant had abused Adderall and other drugs even before he was able to obtain Adderall by prescription from Dr. Buonanno. The defendant suffered a heart attack in October 2002 that may have been related to Adderall and steroids that he had been taking, according to statements that he made.

In 2003, after he left Home Hospital. the defendant sought to fraudulently obtain Adderall from two physicians and succeeded in doing so from one.

At the time of the Murder, the defendant did not appear or act intoxicated but he did have a tremendous amount of Adderall in his system, a portion of which resulted from Adderall that he obtained illegally. He said that he had been taking Adderall like "M&Ms" the week of the murder.

In testimony at trial and pretrial interviews conducted with the defendant by Dr. Welner and others, the defendant showed a willingness to deceive and attempt to

manipulate others' impressions of him. He was willful and vigorous mentally. He did acknowledge that he knew that drugs and other aspects of his behavior had been destructive but that he continued with that behavior anyway. He gave no credible indication of remorse for the murder. Rather it was clear from the evidence at trial that the defendant's reasons for murdering his father were unrelated to his drug use or mental problems, if any existed beyond the drug abuse, and were precipitated by factors in his relationship with his father.

Taken with other evidence about his history, such as his history of thievery, it is clear that the aggravating circumstances in this section of the Order describe a history of anti-social behavior that was serious, cannot be modified by therapy or short-termed incarceration and is unlikely ever to change.

The aggravating factors noted and discussed in this section of the Order deserve very heavy weight.

History of Criminal Activity. Although the defendant's history of criminal convictions is not an aggravating circumstance here, his history of criminal activity and behavior is. It included active and extensive illegal drug activity for years. It also included thievery over the course of years from businesses, strangers, friends and family. It is particularly weighty when put together with his history of lying and deception and his determination to continue with illegal and anti-social behavior even when it was apparent that it led him to violent and destructive – at times self-destructive – behavior. It is closely related to and is weighed with these aggravators found by the jury:

- Defendant's history of criminal activity
- Defendant committed crimes while on bond
- Defendant's history of contacts with police for violence and unruly behavior
- Defendant's altercations with and threats and violence towards his parents
- Defendant's lack of remorse and failure to accept responsibility for the Murder of his father Errol Beumel Sr.

Particularly weighty is the fact that the murder was committed while the defendant was on bond on charges that included the crime of Intimidation, which resulted from threats and violence against his parents in late January 2003. That aggravator is especially serious in most cases because, as here, it demonstrates that the defendant cannot be deterred from criminal behavior by the law and the operation of the court system. The murder was against one of the victims of the charge for which he was on bond. The defendant not only committed the murder while on bond, but he also committed a series of serious drug offenses.

Nor was the defendant deterred from criminal behavior by his encounters with the police at the end of January 2003 and his arrest by them for Intimidation.

His criminal behavior included the behavior towards his parents, especially in January 2003, when the evidence graphically described his threats to kill them, his destruction of their property and the fear he caused them.

Despite many opportunities to do so, the defendant did not express remorse for the murder of the victim until trial and the court did not find that claim of remorsefulness in

trial to be credible. Nor did the jury as was apparent from its verdict.

It is again worth noting that, taken with other evidence about his history, it is clear that the aggravating circumstances in this section of the Order, as in other sections, describe a history of anti-social behavior that was serious, cannot be modified by therapy or short-termed incarceration and is unlikely ever to change.

MITIGATING FACTORS

The possible mitigating factors seem to be these: age of the defendant, lack of history of criminal convictions and possible mental illness.

Age of Defendant. Although the defendant is in his twenties, his age is not a mitigator, for these reasons among others. He was in his fourth year of college. His crimes were not youthful indiscretions. The defendant was not a youth at the time of the murder.

Lack of History of Criminal Convictions. The defendant has no criminal convictions. His misdemeanor withheld judgment noted in the Presentence Investigation Report is insignificant here. However as a mitigator, this factor is not entitled to weight because the defendant does have a history of criminal activity, by his own admission, as discussed above.

Mental Illness. Suggestion has been made that the defendant is suffering from a mental illness and was also suffering from such an illness at the time of the murder. The psychiatrists who gave opinions on the insanity defense split over the question of the defendant's criminal responsibility. The jury decided that the defendant was not

insane under the Indiana definition at the time of the offense and the court agrees with that verdict. The court has also concluded as the jury did that a verdict or judgment of "guilty but mentally ill" is not justified under the law and the clear weight of the evidence.

The court is cognizant of the guidance of the Indiana Supreme court in determining the weight to be given to mental illness as a mitigator. The court has suggested several factors to consider:

> . . . . we (Indiana Supreme Court) suggested several factors that support the amount of weight that mental illness should be given in a sentencing decision, such as: 1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment, 2) overall limitations on functioning, 3) the duration of the mental illness, and 4) the extent of any nexus between the disorder or impairment and the commission of the crime.

Leon v. State, 797 NE 2d 743, 749 (Ind.2005); *Weeks v. State,* 697 NE2d 28, 30 (Ind.1998).

On this matter, the court finds that the defendant's mental state was best described by Dr. Welner whose report is incorporated in this Order by reference as part of the court's findings. The court also relies upon the testimony of Dr. Anne Gilbert, Dr. Richard Rahdert and to some extent Dr. Stephen Berger. While not disparaging the two other experts who gave testimony as to criminal responsibility, the court finds that the opinions of those experts were inconsistent with the jury's verdict and contrary to the clear weight of the evidence.

Dr. Welner has concluded that the defendant is presently experiencing schizophrenia. It is difficult to assess the extent of the disorder's impact upon the defendant at this time because of the defendant's attempts to deceive and manipulate. However Dr. Welner's view is that the disorder was insignificant in explaining the defendant's behavior at the time of the murder and that it did not have a nexus with the murder or the defendant's behavior at that time. The murder seems to have occurred for reasons that were unrelated to mental illness. The defendant was able to control his behavior. Dr. Welner's opinion is supported by the clear weight of the evidence and the jury's verdict.

Dr. Welner's view is that schizophrenia has manifested itself since the defendant has been in jail if in fact the defendant has schizophrenia.

In accord with that view is the assessment of Dr. Richard Rahdert. Dr. Rahdert treated the defendant shortly after the Murder for a few months. The defendant was not psychotic after the murder and was intact mentally. Dr. Rahdert's view was that the defendant lapsed into psychosis in the late summer or early fall 2003. Dr. Rahdert termed it Psychosis NOS. He said that he did not have sufficient history to diagnose the disorder as schizophrenia.

That evidence leads to the conclusion that the defendant may have a mental illness at this time that was not noticeably effecting him at the time of the murder, if in fact it existed at that time at all. It is unreasonable to factor a mental illness that the defendant may have now into the balance of factors to determine the appropriate sentence because it did not have a nexus to the crime or the defendant's behavior at the time of the murder.

JUDGMENT AND SENTENCE

The court finds that the aggravators outweigh the mitigators. The court further finds that the aggravators are serious and should be given great weight. Therefore the court concludes that, for the crime of Murder, the presumptive sentence of 55 years should be increase [sic] by ten years for a sentence of 65 years. Further the court concludes that 5 years should be imposed for the crime of Using a Firearm in the Commission of an Offense and that it should be served consecutively to the sentence of the crime of Murder.

Therefore the court commits the defendant to the Indiana Department of Corrections for a term of seventy years. The defendant is given credit for having served 959 days in custody to this date and a like amount of good time credit.

The court further recommends to the Indiana Department of Corrections that a mental health assessment be done of the defendant to determine the extent of any mental illness and provide suitable treatment based upon that evaluation. The Court also recommends that the defendant be allowed to complete his college degree during his incarceration. The defendant is ordered to pay court costs in the amount of $156.00.

The defendant is advised of his right to appeal and counsel is appointed to represent him on appeal as it appears that the defendant does not have funds to retain counsel. The court appoints attorney James A. Gothard for that purpose.

Entered this 9th day of December 2005.

/s/ Donald C. Johnson
Judge, Superior Court of Tippecanoe County

cc: Attorneys

CLERK

SUPREME COURT, COURT OF APPEALS,
AND TAX COURT

[SEAL]
Kevin S. Smith
Clerk

STATE OF INDIANA

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Cause Number

79A04-0601-CR-00018
Lower Court Number:
79D010304MR1

BEUMEL, ERROL D., JR. -V- STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 3/08/07

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S

VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD CHIEF JUSTICE

ALL JUSTICES CONCUR, EXCEPT SULLIVAN, J., WHO VOTES TO GRANT TRANSFER.

KM

WITNESS my name and the seal of said Court,
this 8th day of MARCH, 2007

/s/ Kevin S. Smith
Clerk, Supreme Court, Court
of Appeals and Tax Court

STATE OF INDIANA)
) SS: IN THE TIPPECANOE
) SUPERIOR COURT
COUNTY OF TIPPECANOE)

STATE OF INDIANA)
) CAUSE NO. 79D- 01-0306-MR-1
v.)
) (Filed Nov. 1, 2005)
ERROL DWAIN)
BEUMEL, JR.)

VERDICT FORM FOR
AGGRAVATING CIRCUMSTANCES

We, the Jury find that the aggravating circumstances beside which we have placed check marks have been proven beyond a reasonable doubt.

X The brutality of the crime

X Nature and circumstances of the crime

X Errol Beumel Sr. was defenseless during the defendant's attack upon him and attempted to flee. The defendant prevented his escape.

X The defendant's act in committing Murder was senseless and disturbing in that it was committed on Errol Beumel Sr., a person who, by reason of his relationship with the defendant, was especially vulnerable to the defendant. The defendant violated the trust in that relationship.

X The crime was among the worst of offenses in the nature of its commission.

X Both the crime committed in this case and the offender were among the worst of offenses and offenders as demonstrated by the nature, extent and depravity of

the offense and what it reveals about the defendant's character.

X Defendant's drug and alcohol abuse

X The defendant purposefully took drugs before the Murder of his father Errol Beumel Sr. knowing that they might have a serious adverse impact on him.

X There is a high risk that the defendant will re-offend.

X Defendant refused to take steps to deal with his supposed problems, including therapy when recommended.

X The defendant did not take advantage of rehabilitation opportunities.

X The defendant improperly exploited one or more physician-patient relationships.

X Short-term incarceration did not deter the defendant from commission of further crime.

X Defendant's history of criminal activity

X Defendant committed crimes while on bond.

X Defendant's history of contacts with police for violence and unruly behavior

X Defendant's altercations with and threats and violence towards his parents

X The character of the defendant

X Defendant needs to be within the control of the Department of Corrections for a period of time greater than the presumptive sentence.

X Defendant's lack of remorse and failure to accept responsibility for the Murder of his father Errol Beumel Sr.

X An aggravated sentence is recommended by the next of kin.

/s/ David R. McKinnis Date: November 11, 2005
Foreperson of the Jury

IN THE TIPPECANOE SUPERIOR COURT
STATE OF INDIANA

2005 TERM

STATE OF INDIANA, CAUSE NO. 79D01-0306-MR-1

v.

ERROL D. BEUMEL, JR.

MOTION TO DISMISS STATE'S NOTICE OF AGGRAVATORS

(Filed Nov. 2, 2005)

Comes now the defendant, by counsel, and in support of this Motion to Dismiss State's Notice of Aggravators, states:

1. That, on or about April 29, 2003, the defendant was charged with Court [sic] I, Murder and Count II, Using a Firearm in the Commission of an Offense.

2. That, on October 12, 2005, the State filed a Notice of Aggravators alleging certain aggravating factors and circumstances as follows:

(1) The brutality of the crime.

(2) Nature and circumstances of the crime.

(3) Errol Beumel Sr. was defenseless during the defendant's attack upon him and attempted to flee. The defendant prevented his escape.

(4) The defendant's act in committing Murder was senseless and disturbing in that it was committed on Errol Beumel Sr., a person who, by reason of his relationship with the defendant, was especially vulnerable to the defendant. The defendant violated the trust in that relationship.

(5) The crime was among the worse of offenses in the nature of its commission.

(6) Both the crime committed in this case and the offender were among the worst of offenses and offenders as demonstrated by the nature, extent and depravity of the offense and what it reveals about the defendant's character.

(7) Defendant's drug and alcohol abuse

(8) The defendant purposefully took drugs before the Murder of his father Errol Beumel Sr. knowing that they might have a serious adverse impact on him.

(9) There is a high risk that the defendant will re-offend.

(10) Defendant refused to take steps to deal with his supposed problems, including therapy when recommended.

(11) The defendant did not take advantage of rehabilitation opportunities.

(12) The defendant improperly exploited one or more physician-patient relationships.

(13) Short-term incarceration did not deter the defendant from commission of further crime.

(14) Defendant's history of criminal activity.

(15) Defendant committed crimes while on bond.

(16) Defendant's history of contacts with police for violence and unruly behavior.

(17) Defendant's altercations with and threats and violence towards his parents.

(18) The character of the defendant.

(19) Defendant needs to be within the control of the Department of Corrections for a period of time greater than the presumptive sentence.

(20) Defendant's lack of remorse and failure to accept responsibility for the Murder of his father Errol Beumel Sr.

(21) An aggravated sentence is recommended by the next of kin.

See attached Exhibit A.

3. That the State's Notice of Aggravators is defective in that it fails to state proper aggravators for a sentencing jury trial, fails to state aggravators with sufficient specificity to prepare a defense and ensure unanimity of a verdict, the alleged aggravators are cumulative, do not comply with due process requirements, and are unconstitutional.

WHEREFORE, the defendant respectfully requests this Court dismiss the State's Notice of Aggravators as outlined above, and for all other relief just and proper relief.

Respectfully submitted,

/s/ Amy Hutchison

Amy Hutchison, #15764-29
Chief Public Defender
301 Main Street
Lafayette, IN 47901
(765) 423-9214

IN THE TIPPECANOE SUPERIOR COURT
STATE OF INDIANA

2005 TERM

STATE OF INDIANA

v.

ERROL D. BEUMEL, JR.

CAUSE NO. 79D-01-0306-MR-1

(Filed Nov. 2, 2005)

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS STATE'S NOTICE OF AGGRAVATORS

* * *

LEGISLATIVE AND CASE HISTORY

Since a sentencing reform in 1977, Indiana's sentencing scheme had remained relatively unchanged until the *Blakely* issues arose. A historical perspective of the *Blakely* line of cases follows. In 1999, *Jones v. New York* was decided and the United States Supreme Court held that the due process clause of the 5th Amendment as well as the notice and jury trial rights of the 6th Amendment prevented *any fact* ***other than a prior conviction*** that is used to increase the maximum sentence *must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt*. The Indiana legislature made no changes to our sentencing scheme after *Jones*. See *Jones v. New York*, 119 S.Ct. 1215 (1999).

In 2000, *Apprendi v. New Jersey* was decided and the United States Supreme Court *again* held that *other than a prior conviction*, any fact that increases the penalty for a crime beyond the statutory maximum must be *submitted*

to a jury and proven beyond a reasonable doubt.[1] In *Apprendi*, the defendant pled guilty and, at sentencing, the Court found by a preponderance of evidence additional facts defendant did not admit (that shooting was motivated by racial hostility). The Indiana legislature made no changes to our sentencing scheme after *Apprendi*. See *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

On June 24, 2004, the United States Supreme Court decided *Blakely v. Washington* and *again* reiterated the holdings in *Jones* and *Apprendi* clarifying that the statutory maximum referred to in those cases is *the maximum the Judge may impose* ***solely on the basis of facts found in the jury verdict or admitted by the defendant*** – in other words – not the maximum after finding additional facts but the *maximum without additional facts*. In *Blakely*, the defendant pled guilty and, at sentencing, the Court found additional facts (that defendant acted with deliberate cruelty).[2] See *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

There were disagreements amongst the bar regarding whether or not *Blakely* would have any impact on Indiana's sentencing scheme. It was argued that Washington's sentencing scheme was equivalent to Indiana's presumptive sentencing scheme requiring a Judge to find aggravating

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[1] The *Apprendi* Court said nothing about facts being charged in the indictment. Further in *US v. Harris* (NJ Dist August 18, 2004), at least one Court has held that although the sentencing aggravators do not need to be charged in the original indictment, a defendant should be provided with due notice of the sentencing factors to prevent prejudicial surprise at trial.

[2] The *Blakely* Court reiterated that a defendant does not waive the right to a jury trial on sentencing by pleading guilty.

factors to increase the sentence. It was argued that the State could just require the defendant to waive his right to a jury trial at sentencing in order to enter into a plea agreement. Further, it was argued that after *Blakely*, in Indiana, without a prior conviction, the Judge could impose the presumptive sentence only. It was noted that Indiana's case law had long held that only a single aggravator was necessary to increase the presumptive sentence (even to the maximum) or to impose consecutive sentences. The Indiana legislature made no changes to our sentencing scheme after *Blakely*.

On March 9, 2005, the Indiana Supreme Court decided *Smylie v. State* interpreting the *Blakely* line of cases. The Court found Indiana's sentencing scheme unconstitutional and held that aggravating factors (with the exception of a prior conviction) must be found by a jury beyond a reasonable doubt (or admitted by a defendant) before a sentence can be increased beyond the presumptive.

* * *

ARGUMENT

* * *

IV. The State is prohibited from alleging and the Court or jury is prohibited from considering any non-statutory aggravators.

Criminal statutes are to be strictly construed against the state and in construing criminal statutes, the Court's only concern is the legislative intent as expressed in the statue. *Och v. State*, 431 N.E.2d 127 (Ind. App. 1982), *Loftus v. State*, 52 N.E.2d 488 (Ind. 1944), *Pennington v. State*, 426 N.E.2d 408 (Ind. 1981). Statutory interpretation is a matter of law. When interpreting a statute, the Court will look to the express language of the statute and the

rules of statutory construction, however, the Court may not interpret a statute that is clear and unambiguous on its face but shall give plain, ordinary and usual meaning to the words in the statute unless a contrary purpose is clearly shown by the statute itself. The language employed in a statute is deemed to have been used intentionally and, in amending an act, the legislature is presumed to have considered the history of the act and case law regarding the subject matter to be construed. *Townsend v. State*, 793 N.E.2d 1092 (Ind. App. 2003). When the legislature amends a statute in response to case law, the legislature's intent to clarify that law is clear. *Senn v. State*, 766 N.E.2d 1190 (Ind. App. 2002). Under the rules of statutory construction, specific statutes control over general statutes. *West Clark Community Schools v. H.L.K.*, 690 N.E.2d 238 (Ind. 1997). Any ambiguity in a criminal statute must be resolved most favorably to the accused and against imposing a penalty. *Shaw v. State*, 211 N.E.2d 172 (Ind. 1965), *Gaddis v. State*, 680 N.E.2d 860 (Ind. App. 1997), *Pennington v. State*, 426 N.E.2d 408 (Ind. 1981).

Other recent cases interpreting *Blakely* after the enactment of the emergency legislation on May 11, 2005 have determined that certain factors not listed in the new sentencing statutes are improper considerations as separate aggravators.[7] On June 15, 2005, the Indiana Supreme Court decided *Morgan v. State*, 829 N.E.2d 12. Morgan pled guilty pursuant to a plea agreement. At sentencing the trial Court found four aggravating factors including (1) defendant had prior conviction, (2), defendant was on probation at time of offense, (3) defendant intended to sell

[7] It is important to note that these cases did not directly address the impact of the newly enacted legislation in response to *Blakely*.

drugs for profit, and (4) previous punishments failed to rehabilitate. The Trial Court also found five (5) mitigating factors determining that the aggravators outweighed the mitigators and increasing the standard fixed term by five (5) years. Morgan argued the trial court both considered improper aggravators and wrongly balanced the aggravators and mitigators found. Morgan conceded that the first aggravator, her prior conviction, was proper although she asserts it was insufficient, standing alone, to support an increased sentence. The State conceded that the third aggravator, intent to sell for profit, was improper. The Indiana supreme Court agreed that Morgan's prior criminal conviction, alone, did not support an enhanced sentence. Although it is often stated that a single aggravator can support an enhanced sentence, Judges must think about the weight to give prior conviction(s) considering their number and seriousness as well as their proximity and similarity to the current offense that might reflect on culpability. The Court further determined the second aggravator, defendant was on probation at the time of the offense, was properly found by Morgan's admission during her guilty plea hearing that she was on probation. However, the Court found that the fourth aggravator, previous punishments failed to rehabilitate, was merely "derivative" of a criminal history legitimately considered in weighing such history but *could NOT be considered as a separate aggravating factor.*

On September 20, 2005, the Indiana Court of Appeals decided *Muncy v. State*, 834 N.E.2d 215. Defendant was convicted by a jury. At sentencing, the trial Court found several aggravating factors including (1) risk defendant will commit another crime, (2) nature and circumstances of crime, (3) defendant's extensive criminal history,

(4) defendant's character, (5) defendant's past repeated violations of probation, (6) likelihood reduced or suspended sentence will depreciate seriousness of offense, and (7) crime was committed against law enforcement during execution of duties. The trial Court found no mitigating factors and enhanced the sentence. The Court of Appeals reiterated that "a single aggravating circumstance can justify the imposition of an enhanced sentence" and found that defendant's criminal history, alone, was sufficient to enhance the sentence. Therefore, the Court did not address whether the other aggravating circumstances found were proper under *Blakely* and further noted that Muncy waived the issue on appeal. However, in a dissenting opinion, Justice Barnes disagreed that Muncy had waived the *Blakely* issue although he concurred that defendant's prior criminal history was a proper aggravating factor. Justice Barnes refused to say defendant's criminal history was enough to enhance the sentence as the trial court found several other aggravators "that are invalid under *Blakely* and *Smylie* including the nature and circumstances of the crime, Muncy's character, and that the attempted battery was against a law enforcement office [sic] during the execution of his duties".

On October 13, 2005, the Indiana Court of Appeals decided *Gentry v. State*, 835 N.E.2d 539. Gentry was convicted by jury trial. At sentencing, the trial Court found his extensive criminal history as an aggravating circumstance as well as his failure to rehabilitate and enhanced his sentence. The Court of Appeals held that "the aggravating circumstance that Gentry failed to rehabilitate should not have been considered as a separate aggravating circumstance" but that such is a "legitimate

observation about the weight to be given to Gentry's criminal history".

The legislature has evidenced its intent that certain specific aggravators (need for correctional rehabilitation and imposition of a reduced sentence depreciate the seriousness of a crime) are no longer proper aggravators to be considered in sentencing. The emergency legislation enacted on May 11, 2005, specifically deleted those aggravators from the statute. Thus, any references to those aggravators must be dismissed from the State's Notice of Aggravators. The State has further alleged, as separate aggravating circumstances, mere "observations" about the weight to be given to proper statutory aggravating factors. See *Morgan*, *Muncy* and *Gentry* supra. Thus, any references to those *non-statutory* "observations" must be dismissed from the State's Notice of Aggravators.

V. The items listed in the State's Notice of Aggravators are cumulative and fail to provide sufficient specificity to prepare a defense.

In order to satisfy the due process clause, an information must charge an offense in direct and unmistakable terms, and any reasonable doubt as to the offense charged must be resolved in favor of the accused. *Moran v. State*, 477 N.E.2d 100 (Ind.Ct.App. 1985); *Gebhard v. State*, 459 N.E.2d 58 (Ind.Ct.App. 1983). When more than one act can fall under the general definition provided by a statute, the State must do more than simply recite the statute in the charging information in order to provide due process notice to the defendant. *Id.* A defendant is entitled to notice of the aggravators alleged against him as if they were charged crimes. *Blakely* at 2541 (noting the concern that a "defendant, with no warning in either his

indictment or plea," could see his sentence balloon "based not on facts proved to his peers beyond a reasonable doubt"). Any fact that enhances a defendant's sentence beyond the maximum, as understood in *Blakely*, is functionally equivalent to an element of the crime and must be charged in the indictment, submitted to a jury and proved beyond a reasonable doubt. *Apprendi* at 490.[8]

Even if the items submitted in the State's Notice of Aggravators are to be considered as proper and separate aggravators, they are cumulative and without sufficient specificity to prepare a defense. A defendant's right to a jury trial under the *Blakely* line of cases encompasses the right to a unanimous verdict as to each alleged aggravator. If the State intends to rely on uncharged conduct, the State must allege such conduct in a manner to allow for preparation of a defense. The defendant is entitled to know the specific facts upon which the State relies in making allegations related to, for example, defendant's character, risk to re-offend, failure to rehabilitate, exploitation of relationships, etc. in order to prepare a proper defense. A defendant's due process rights are further violated if the State is permitted to merely restate the same item in a different manner in order to increase the number of aggravators. Such "restated" aggravators should merge for sentencing purposes similar to the method of merging lesser included offenses. Therefore, the

[8] See also *US v. Harris*, 2004 U.S. Dist. LEXIS 16239 (N.J. Dist. August 18, 2004) holding that although the sentencing aggravators do not need to be charged in the original indictment, a defendant should be provided with due notice of the sentencing factors to prevent prejudicial surprise at trial.

State's Notice of Aggravators that are not specifically listed under IC 35-38-1-7.1 should be dismissed.

CONCLUSION

* * *

After the Indiana Supreme Court found Indiana's sentencing scheme unconstitutional, the legislature . . . evidenced its intent that certain specific aggravators (need for correctional rehabilitation and imposition of a reduced sentence depreciates the seriousness of a crime) are no longer proper aggravators to be considered in sentencing. Further, recent case law provides that facts are mere "observations" about the weight to be given to proper statutory aggravating factors rather than separate and proper aggravators.

A defendant is entitled to notice of the aggravators alleged against him as if they were charged crimes. A defendant is also entitled to know the specific facts upon which the State relies in making those allegations in order to prepare a proper defense. A defendant's due process rights are further violated if the State is permitted to merely restate the same item in a different manner in order to increase the number of aggravators. The Court may not consider matters outside the statutorily listed aggravators as separate aggravators. The *only* statutorily listed aggravators contained in the State's Notice of Aggravators that the Court may consider are (14) defendant's history of criminal activity *limited to prior* ***convictions*** and (15) defendant committed crimes while on bond *if the jury finds beyond a reasonable doubt that defendant*

was on bond at the time of the offense. The remaining items contained in the State's Notice of Aggravators should not be considered by the Court *at all* or should be considered not as separate aggravators but with regard to the weight to be given to (14) and (15) above.

Respectfully submitted,

/s/ Amy Hutchison
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Chief Public Defender
301 Main Street
Lafayette, IN 47901
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APPELLATE CASE NO. _____

STATE OF INDIANA	)	**IN THE**
	)	**SUPERIOR COURT**
	) **SS:**	
	)	**OF TIPPECANOE**
COUNTY OF TIPPECANOE	)	**COUNTY**
STATE OF INDIANA	) **Case No.**	
	)	**79D01-0304-MR-1**
vs	)	
ERROL DWAIN BEUMEL, JR.	) **The Honorable**	
	)	**Donald C. Johnson**

TRANSCRIPT OF COMPETENCY HEARINGS HELD OCTOBER 17, 2003 AND SEPTEMBER 20, 2005; JURY TRIAL HELD NOVEMBER 1-4 & 7-11, 2005; AND SENTENCING HEARING HELD DECEMBER 9, 2005

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Attorney for Defendant

* * *

[1934] **November 11, 2005**

* * *

[2044] I filed a Motion to Dismiss the Aggravators that the State filed, uh, based on Blakeley, Your Honor, that my client should have the right to, first of all, they're not statutory aggravators. And secondly, under Blakeley, Judge, my client, this statute's unconstitutional, based on Blakeley and Smiley. And two, under the doctrine of the [amelioration], uh, his due process rights changed when they changed the statute in 2005. And he should be allowed since they changed the, the statute to have the benefit of being sentenced under the new statute. Cause his, his right under due processes entitles him to have the jury decide aggravators. And I would ask that one, you find the statute unconstitutional based on Smiley. And also there's no procedure that was in, that was put in place for the jury to make a determination and that's defined by statute. I'd ask that you incorporate the memorandum of law and the motion as part of my argument.

BY THE COURT: I will incorporate the, uh, the arguments and the memorandum.

BY MR. DONALDSON: Thanks, Judge. The old aggravating statute applies in this case, not the new one. If you apply the new one, the fact of the matter is the argument's the same, both in the old statute and the new statute post Smiley and Blakeley. The criteria that are [2045] listed as aggravators do not limit the matters that may be considered. It's identical in the old statute and the new statute. It is not an exclusive list.

BY THE COURT: Okay.

BY MS. HUTCHISON: Can I, can I respond just briefly?

BY THE COURT: You're doing it for the Court of Appeals. Go ahead.

BY MS. HUTCHISON: All I want to say –

BY THE COURT: If you've got something new to add, yeah.

BY MS. HUTCHISON: – is there are cases cited in the brief that we had filed and, uh, basically, Judge, those other factors are considered by the Court in regards to the weight that the Court should give the statutory aggravators.

BY THE COURT: What's your response to those cases that are cited, Jody?

BY MR. DONALDSON: Judge, I just got 'em. And I cannot respond.

BY THE COURT: You just don't know, do you?

BY MR. DONALDSON: No.

BY THE COURT: Okay. Let's go off the record.

* * *

[2048] (At this time the jury is returned to the courtroom.)

BY THE COURT: You may be seated. Thank you very much. I'm going to start out with an understatement. Normally after reaching a verdict, your duty is generally, should be over. However, in this case, the State has filed an additional notice of aggravating circumstances, which are additional facts that must be proven to you beyond a reasonable doubt. These aggravating circumstances relate to the sentencing phase of the trial. And the prosecutor has now made a Motion to Incorporate the

Previous Hearings and Trials, something to that effect. What did you, what did I hear you say?

BY MR. DONALDSON: Judge, on this last phase, we would move to incorporate all prior hearings, all prior evidence, and all prior testimony.

BY THE COURT: Any objections?

BY MS. HUTCHISON: Your Honor, I think we have an agreement. I have a continuing objection based on due process –

[2049] **BY THE COURT:** Don't change the subject. Do you join in, do you object to his Motion, the incorporation?

BY MS. HUTCHISON: Yes, Judge, I do.

BY THE COURT: Okay. That's granted. Now you have another Motion. What's your Motion?

BY MS. HUTCHISON: Well, that includes testimony, Judge. And my argument is in regards to the previous Motion and I would incorporate that argument that we made in regards to Blakeley and Smiley.

BY THE COURT: The Constitutional issues.

BY MS. HUTCHISON: Yes. Yes.

BY THE COURT: You want to incorporate all previous arguments and so forth –

BY MS. HUTCHISON: That's correct.

BY THE COURT: – and the State probably does, too.

BY MR. DONALDSON: Yes, Judge.

BY THE COURT: That'll be fine.

BY MS. HUTCHISON: And then I think we have an agreement it can just be a continuing objection.

BY THE COURT: That's right. That'd be fine.

* * *

[2062] **BY THE COURT:** You may be seated. Ladies and gentlemen of the jury, have you reached a decision regarding the aggravating factors?

[2063] **BY A JUROR:** Yes, we have.

BY THE COURT: Would you hand the list to the bailiff, please?

The verdict form for the aggravating factors indicates that as to each aggravating factor: the brutality of the crime; the nature and circumstances of the crime; the fact that Errol Beumel, Sr. was defenseless during the defendant's attack upon him, he attempted to flee, the defendant prevented his escape; the defendant's act in committing murder was senseless and disturbing; and it was committed on Errol Beumel, Sr., a person, who by reason of his relationship with the defendant was especially vulnerable to the defendant, the defendant violated the trust in that relationship; the crime was among the worst of offenses in the nature of its commissions; both the crime committed in this case and the offender were among the worst of offenses; the offender demonstrated by the nature, extent and depravity of the offense and what it reveals about the defendant's character; the defendant's drug and alcohol abuse; the defendant purposely took drugs before the murder of his father, Errol Beumel, Sr., knowing that they might have a serious adverse impact upon him; there's a high risk that the defendant will re-offend; the defendant refused to take steps to deal with his supposed [2064] problems, including therapy when

recommended; the defendant did not take advantage of rehabilitation opportunities; the defendant improperly exploited one or more physician/patient relationships; short-term incarceration did not deter the defendant from commission of further crime; the defendant's history of criminal activity; the defendant committed crimes while under bond; the defendant's history of contacts with the police for violence and unruly behavior; defendant's altercations with and threats and violence toward his parents; the character of the defendant; the defendant needs to be within the control of the Department of Corrections for a period of time greater than the presumptive sentence; defendant's lack of remorse and failure to accept responsibility for the murder of his father, Errol Beumel, Sr.; an aggravated sentence is recommended by the next of kin. Signed by the jury foreman and dated today's date.

Do you desire that I poll the jury?

BY MS. HUTCHISON: No, Your Honor.

BY THE COURT: Okay. The Court will consider these aggravating factors when it comes to sentencing.

* * *

[2066] **December 9, 2005**

* * *

[2111] **BY THE COURT:** The jury in, in this case, found a number of aggravating factors. There's like sixteen (16) of them. They listed the brutality of the crime – these are their findings – they looked at the nature and circumstances of the crime. They noted that Errol Beumel, Sr. was defenseless during the defendant's attack on him, attempted to flee and the defendant prevented the escape. Defendant's act in committing murder was senseless and

disturbing. And that it was committed on Errol Beumel, Sr., a person by reason of his relationship with the defendant was especially vulnerable to the defendant. The defendant violated this trust in that relationship.

There's the defendant's drug and alcohol abuse. There is a high risk that the defendant will re-offend. [2112] The defendant refused to take steps to deal with problems, including therapy that was recommended. The defendant improperly exploited one or more of the physician/patient relationships in order to get more drugs. Short-term incarceration did not deter the defendant from the commission of further crime.

The Court looks at the, the jury looked at the defendant's history of criminal activity. The defendant committed the crimes, did commit crimes while on bond. The defendant's history of contacts with the police for violence and unruly behavior. The defendant's altercations with and threats and violence toward his parents. The character of the defendant. The defendant's lack of remorse and failure to accept responsibility for the murder of his father. An aggravated sentence is recommended by the next of kin.

Judgment, according to this judgment on the jury's verdict with respect to these aggravators. In determining the weight to be given to these aggravators, the Court is cognizant of the recommendation of the family representative in the, that testified at trial. Particularly, Mom's testimony was particularly, uh, particularly moving. She indicated that the family was scared of Errol and that he was a danger to, to them and to others. The Court believes that the recommendations of the [2113] family representative and the family here are reasonable.

In terms of the nature and circumstances of the crime, the circumstances, circumstances and nature of this crime are far graver than the Court would ordinarily encounter in the offense of murder. In this case the Court considers and gives great weight to certain other aggravators found by the jury. The brutality of the crime, Errol Beumel, Sr. was defenseless during, when the defendant attacked him. It was just, uh, the whole thing was just senseless and disturbing. The father was there to try to help. He trusted you. And for whatever reason, you murdered him. Right in front of your mom.

In certain ways the murder was almost an execution. Told him to get down on his knees, when he didn't and he started to leave, you shot him several times. You followed him into the yard, he tried to get away. He collapsed in the ditch across the road. You went into the house, you composed yourself, you reloaded. Returned to the ditch with a flashlight and flashed it on your dad and fired more bullets into him. This is all while your mom was trying to give your dad CPR. And you told her to get away, didn't want to hurt her.

Evidence indicates that you willfully and purposely abused Adderall and other drugs to the extent that you [2114] did become psychotic at times. In light of the totality of the facts and circumstances of the case, this factor is a very serious aggravator, especially in relation to those aggravating factors found by the jury. Your drug and alcohol use, it's a high risk that you will re-offend. Again you refused to take steps to deal with your problems. The altercations and threats and violence that you showed towards your parents. The Court does not believe that short-term incarceration would deter you from the commission of further crimes.

And you do have a lack of remorse and failure to accept responsibility for the murder, although you say you made a mistake, you're sorry. I don't find that to be remorse and accepting responsibility.

Although you do not have a history of criminal convictions, you do have a history of criminal activity and behavior in terms of your active and extensive illegal drug use for a number of years. You were involved in a number of thefts. You have a history of contacts with the police for violence and unruly behavior.

Particularly it's important to note that this murder was committed while you were out on bond on charges that included the crime of intimidation, which resulted from threats and violence against your parents in late January of 2003.

[2115] In terms of mitigators, the Court does not find that age is particularly a mitigator in this case. You're in your twenties. The Court can't, is unable to find that that particular age is a mitigator. You do not have an extensive criminal, you don't have any prior convictions. But since you were out on bond at the time, the Court's not gonna, is unable to find the lack of convictions as a mitigating factor in this case, as the Court goes through the analysis.

A number of psychiatrists gave opinions on the insanity defense. And they're split over the question of your criminal responsibility. Jury decided that you were not insane under Indiana definition at the time of the offense. The Court agrees with that verdict. The Court has also concluded, as the jury did, that a verdict of judgment of guilty but mentally ill is not justified under the law in the clear weight of the evidence.

The Court is cognizant of the guidelines of the Indiana Supreme Court in determining the weight to be given to mental illness as a mitigator. The Court is, that Court is given a number of factors for the Court to consider, including the extent of the defendant's ability to control his or her behavior due to the disorder or impairment. Overall limitations on function and the duration of the mental illness and extent of any Nexus [2116] between the disorder or impairment in the commission of the crime.

The Court finds that the defendant's mental state as best be described by Dr. Welner, whose report is incorporated in this order by reference. It's a part of the findings. The Court also relies on the testimony of Dr. Ann Gilbert, Dr. Richard Rahdert, and to some extent Dr. Stephen Berger. A couple of the other experts had different opinions that were inconsistent with the jury's verdict and contrary to the weight of the evidence.

I think Dr. Welner's concluded that you are presently experiencing schizophrenia. Difficult to asses [sic] the extent of this disorder's impact upon you at the time. Welner's view is that the disorder was insignificant in explaining your behavior at the time of the murder and did not have a nexus with the murder or your behavior at the time. Murder seems to have occurred for reasons that were unrelated or not directly related to mental illness. Welner concluded that you were able to control your behavior, behavior and the Court accepts that judgment. It may very well be that the schizophrenia has manifested itself since you have been incarcerated.

The evidence leads to the conclusion that you may have a mental illness at this time that was not noticeably affecting you at the time of the murder if, in fact, it did

[2117] exist at that time. It's unreasonable to factor a mental, to factor a mental illness an offender may have now into the balance of factors to determine the appropriate sentence cause of the lack of the nexus between the defendant's behavior at the time that he, at the time of the murder.

The Court finds the aggravators outweigh the mitigators. The Court gives great weight to these aggravators. The Court concludes that for the crime of murder that the presumptive sentence is not sufficient, that you should receive sixty-five (65) years plus five (5) years imposed for using a firearm in the commission of the offense, for a total of seventy (70) years. You're committed to the Indiana Department of Corrections for a term of seventy (70) years. You'll be given credit for having served nine hundred and fifty-nine (959) days in the custody of the Sheriff of Tippecanoe County at this time. The Court recommends to the Indiana Department of Corrections that a mental health assessment be done of the defendant to determine the extent of any mental illness and provide suitable treatment based upon the explanation.

I, I didn't want to ask for too many different things. I'm afraid they might not do it. If you want me throw it in. I'll do it, but it seems to me the mental illness aspect [2118] needs to be the focus.

BY MS. HUTCHISON: Can my client say something, Judge?

BY THE COURT: Okay. I'm not quite done yet.

BY MS. HUTCHISON: Okay.

BY MR. BEUMEL: Oh.

BY THE COURT: You do have a right to appeal. And I'm inclined to, I know you've been incarcerated for a long time and you don't have any assets. I'm inclined to appoint Jim Gothard –

BY MS. HUTCHISON: That's fine.

BY THE COURT: – to handle the appeal. Are you willing to accept that appeal?

BY MR. BEUMEL: Yes, sir.

BY THE COURT: Mr. Gothard?

BY MR. GOTHARD: Yes, Judge.

* * *

IN THE
INDIANA SUPREME COURT

CAUSE NO. 79A04-0601CR-00018

ERROL D. BEUMEL, JR. Appellant,	) On Appeal from the) Tippecanoe Superior Court
v.	) Cause No. 79D01-0304-MR-00001
STATE OF INDIANA Appellee.	) The Honorable) Donald C. Johnson, Judge.

NOTICE OF ADDITIONAL AUTHORITY

Appellant Errol D. Beumel, Jr., *pro se*, notifies this Court of additional authority pursuant to Ind. Appellate Rule 48:

> Romans 8: 1 (King James Version) ("There is therefore now no condemnation to them which are in Christ Jesus, who walk not after the flesh, but after the Spirit.").

As a representative of the anointing, I declare this authority on behalf of the Kingdom of God.

/s/ Errol D. Beumel Jr.
Errol D. Beumel, Jr., *pro se*

(2)

IN THE

Supreme Court of the United States

No. 06-1640

ERROL D. BEUMEL, JR.,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for Writ of Certiorari
to the Indiana Court of Appeals

STATE OF INDIANA'S BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

Are a defendant's Sixth Amendment rights under *Blakely v. Washington* violated by submitting a redundant list of derivative aggravators to a sentencing-phase jury, and requiring it to make determinations that are beyond the competence of a lay jury?

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STATEMENT

Before *Blakely v. Washington*, 542 U.S. 296 (2004), Indiana had a determinate-sentencing scheme that allowed judges, rather than juries, to find the existence of aggravating facts that would increase a sentence above a presumptive level. *See* Ind. Code § 35-38-1-7.1 (2003); *see also* Ind. Code § 35-50-2-3(a) (2003). That old sentencing statute, in effect when Errol Beumel murdered his father, required sentencing courts to consider specific factors as either mitigating or aggravating, including (1) the risk that the defendant would commit another crime; (2) the nature and circumstances of the crime; and (3) the defendant's character. *See* Ind. Code § 35-38-1-7.1(a) (2003). Indiana courts could also consider other potentially aggravating facts, including whether the defendant had recently violated probation or parole and the defendant's history of criminal or delinquent activity. *See* Ind. Code § 35-38-1-7.1(b) (2003). The statute, however, did "not limit the matters that the court may consider" as aggravators. *See* Ind. Code § 35-38-1-7.1(d) (2003). Ultimately, the old scheme provided that "[a] person who commits murder shall be imprisoned for a fixed term of fifty-five (55) years, with not more than ten (10) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances." Ind. Code § 35-50-2-3(a) (2003).

Following both *Blakely* and *Smylie v. State*, 823 N.E.2d 679, 684-85 (Ind. 2005), which expressly invalidated the judge-as-fact-finder portion of Indiana's old determinate scheme in light of *Blakely*, the Indiana General Assembly adopted indeterminate sentencing. The new scheme permits a court to impose a sentence for a given crime within a range of years, while providing an "advisory sentence," which is a "guideline sentence" that is "nonbinding." *See* Ind. Code §§ 35-50-2-1.3(a); 35-50-2-3(a); *see also* Ind. Code § 35-35-3-1.

This case presents the story of a trial caught in time between *Blakely* and Indiana's legislative fix—and of one judge's unremarkable *ad hoc* attempt to involve a jury in determinate sentencing.

1. Petitioner Errol D. Beumel, Jr., shot and killed his father on April 25, 2003. Pet. App. 5. Beumel did not flee the scene and was apprehended when the police arrived in response to a 911 call from his mother, who witnessed the murder. Pet. App. 5-6. After Beumel was taken into custody, he confessed. Pet. App. 6. The State charged Beumel with murder and use of a firearm in commission of an offense. Pet. App. 6; *see also* Ind. Code §§ 35-42-1-1 (2003), 35-50-2-11 (2003). Beumel did not plead guilty, however, but instead invoked his right to a jury trial and filed a notice of intent to present the insanity defense. Pet. App. 6.

2. As noted above, important events in legal history intervened between Beumel's crime and his trial. On June 24, 2004, the Court issued its decision in *Blakely*, which held that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303 (emphasis original). Thus, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04 (emphasis original).

Then, on March 9, 2005, the Indiana Supreme Court held that Indiana's determinate-sentencing statutes, as historically interpreted by the Indiana courts, violated the Sixth Amendment rule set forth in *Blakely*. *See Smylie*, 823 N.E.2d at 684-85. The Indiana Supreme Court stated that "[f]rom the time Indiana adopted its present sentencing arrangement in 1977, we have understood it as a regime that

requires a given presumptive term for each class of crimes, except when the judge finds aggravating or mitigating circumstances . . . ." *Id.* at 683. In accord with *Blakely*, the court held that the "presumptive term" was the relevant statutory maximum and, therefore, that a defendant's sentence could not exceed the presumptive term unless the facts used for enhancing the sentence were found by the jury or admitted by the defendant. *See id.* at 684-85.

The Indiana Supreme Court further observed that "the unconstitutionality of Indiana's present sentencing system hardly nullifies the entire arrangement." *Id.* at 685. The court held that the General Assembly had clearly intended to abandon indeterminate sentencing when it adopted this system, so the best interpretation of the sentencing statutes was to keep the fixed presumptive terms but require that any aggravating fact not admitted by the defendant be found by the jury. *See id.* at 685-86.

On April 25, 2005, in response to these decisions, the Indiana General Assembly amended Indiana's sentencing statutes and abandoned fixed presumptive terms entirely. For example, the law now provides that "[a] person who commits murder shall be imprisoned for a fixed term of between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years." Ind. Code § 35-50-2-3(a). The "advisory sentence" is "a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence" and is "nonbinding." *See* Ind. Code §§ 35-35-3-1, 35-50-2-1.3(a).

3. Although the new indeterminate-sentencing scheme was in effect by the time Beumel was tried and sentenced, the trial court planned, if Beumel were convicted, to use the old determinate-sentencing scheme in effect when Beumel committed his crime. *See Patterson v. State*, 532 N.E.2d 604, 608 (Ind. 1988). Leading up to trial, therefore, the

prosecution and the court fashioned a method to make the determinate scheme consistent with the mandates of *Smylie* and *Blakely*. Consistent with *Smylie*'s suggested method of carrying out determinate sentencing in a post-*Blakely* world, *see Smylie*, 823 N.E.2d at 685-86, on October 12, 2005, prior to trial, the State submitted to the court a Notice of Aggravators, which included a list of 21 facts that the State would attempt to prove "in support of a sentence exceeding the presumptive sentence." Beumel State App. 339.

The idea behind submitting the Notice was that the State would prove the existence of these facts to the jury, and the facts found by the jury could then properly form the predicate for an ultimate legal conclusion by the court at the sentencing hearing as to the presence of aggravating circumstances. Such a conclusion would allow the sentencing judge to increase Beumel's sentence for murder by up to 10 years. *See* Ind. Code § 35-50-2-3(a) (2003).

On November 9, 2005, in the midst of the trial, Beumel filed a Motion to Dismiss the State's Notice of Aggravators. Beumel argued that (1) the 2003 sentencing statutes were vague and ambiguous because they did not specifically enumerate potential aggravating factors; (2) the court lacked power to convene a jury to determine aggravating facts because there is no Indiana statute or rule providing for this procedure; (3) the court could not consider aggravators that were not specifically enumerated by statute; and (4) the aggravators included in the Notice were cumulative and vague, depriving Beumel of an opportunity to prepare a defense. Beumel State App. 417-31; Tr. 2044.

As an alternative, Beumel urged that he was entitled to be sentenced under the amended sentencing statute, which, of course, would have eliminated the jury's role in sentencing altogether and would have left his sentence completely to the judge's discretion. Beumel State App. 424-25; Tr. 2044. On November 11, 2005, the same day the

jury convicted Beumel and the aggravators were submitted to the jury, the court denied Beumel's motion. Trial Tr. 2044-45.

4. At the end of the two-week trial, the jury rejected Beumel's insanity defense and convicted him of both murder and use of a firearm in the commission of an offense. Pet. App. 6. The jury instructions at the guilt phase did not include any consideration of the Notice of Aggravators submitted by the State because such instructions would have been prohibited by state law according to the trial court. Beumel State App. 440-86; *see also* Tr. 2049.

Following the verdict, the judge reconvened the jury for a separate phase of the trial to determine if the State had proven its aggravators beyond a reasonable doubt. Tr. 2048-49. The judge explained to the jury that "the State has filed an additional notice of aggravating circumstances, which are additional facts that must be proven to you beyond a reasonable doubt. These aggravating circumstances relate to the sentencing phase of the trial." Tr. 2048. At this phase, both parties had the opportunity to present evidence and witnesses, but Beumel did not present any evidence or witnesses and, instead, relied only on his previously denied motion to dismiss. Tr. 2052 ("Judge, based on my Motion, I will not do an opening statement."); Tr. 2062 ("[B]ased on my Motion, Judge, I'm waiving closing.").

This phase of the trial was very short. The State had only one witness—Janet Beumel, the defendant's mother. Tr. 2053-57. Otherwise, the State incorporated the rest of its guilt-phase evidence by oral motion and delivered a closing argument, asking the jury to find that the State had proven the aggravators beyond a reasonable doubt. Tr. 2058-62. At the close of the State's presentation, the judge instructed the jury as to each aggravator that "[i]f the State fails to prove this fact beyond a reasonable doubt, you must find that this aggravating circumstance does not exist." Beumel State

App. 522-33; Tr. 2062.[1] The judge also instructed the jury that its verdict must be unanimous as to the presence or absence of each factor listed in the special-verdict form. Beumel State App. 532.

After a short deliberation, the jury returned the special-verdict form, finding that the State had proven beyond a reasonable doubt the existence of all aggravators in its Notice. Pet. App. 35-37. The judge then dismissed the jury and set a separate sentencing hearing for December 9, 2005, where the court would hear any mitigating evidence, weigh that evidence against the aggravators found by the jury, and then pronounce the proper determinate sentence. Tr. 2064.

5. At the sentencing hearing, the court reviewed the presentence report with Beumel and asked if he had any corrections to make to the report. Tr. 2066-67; *see also* Ind. Code § 35-38-1-8 (requiring court to consider presentence report prepared by probation department in making sentencing determination). Beumel made several minor corrections to the report. Tr. 2067-72. Beumel also presented several mitigating witnesses to testify on his behalf, including family members and psychiatrists testifying as to his mental-health problems. Tr. 2072-2097. The State did not offer any evidence at this hearing. Tr. 2097.

In its Order of Judgment and Sentence, the court explained that "several of the aggravators [found by the jury] are related to others on the list." Pet. App. 21. The court

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[1] The Final Instructions contain only 16 aggravators while the jury's special-verdict form contains 21 aggravators. Pet. App. 35-37; Beumel State App. 522-34. The jury's special-verdict form erroneously contained five aggravators that the State had previously agreed to dismiss. Pet. App. 19; Tr. 2111. Beumel does not argue that this error has in any way prejudiced him (aside from the alleged prejudice resulting from this procedure in its entirety). Pet. 8-12.

determined their "weight by considering them with the others that are related," meaning that the court did not double count related factors. Pet. App. 21. Then, based on the aggravating facts found by the jury, the court determined three of the statutory circumstances to be aggravating, *see* Ind. Code § 35-38-1-7.1 (2003):[2] (1) the nature and circumstances of the crime, (2) Beumel's drug abuse and related conduct, and (3) Beumel's history of criminal activity. Pet. App. 21-28.

More precisely, in considering the "nature and circumstances of the crime," as required under Indiana Code § 35-38-1-7.1(a)(2) (2003), the court noted that the "circumstances of this crime were far graver than the court ordinarily encounters in the offense of Murder." Pet. App. 21. In reaching this conclusion, the court relied on three facts that the jury had specifically found in its special verdict:

> (1) The brutality of the crime; (2) Errol Beumel Sr. was defenseless during the defendant's attack upon him and attempted to flee. The defendant prevented his escape;

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[2] Indiana Code § 35-38-1-7.1 (2003) guided the sentencing proceeding of the court. The statute required the court to consider certain facts (if proven), including (1) the risk that the defendant will commit another crime, (2) the nature and circumstances of the crime, and (3) the defendant's character. *See* Ind. Code § 35-38-1-7.1(a) (2003). These facts could be either aggravating or mitigating. The statute suggested that the court may consider other potentially aggravating facts, including (1) whether the defendant had recently violated probation or parole and (2) the defendant's history of criminal or delinquent activity. *See* Ind. Code § 35-38-1-7.1(b) (2003). The statute made clear, however, that the enumerated facts did "not limit the matters that the court may consider" as aggravators. *See* Ind. Code § 35-38-1-7.1(d) (2003).

> and (3) The defendant's act in committing Murder was senseless and disturbing in that it was committed on Errol Beumel Sr., a person who, by reason of his relationship with the defendant, was especially vulnerable to the defendant. The defendant violated the trust in that relationship.

Pet. App. 22.

With respect to the drug-abuse aggravator, the court explained that Beumel "willfully and purposely abused the drug Adderall and others to the extent that he became psychotic at times." Pet. App. 23. The Court relied on seven facts specifically found by the jury in its special verdict that "deserve very heavy weight":

> (1) Defendant's drug and alcohol abuse; (2) There is a high risk that the defendant will reoffend; (3) Defendant refused to take steps to deal with his supposed problems, including therapy when recommended; (4) The defendant improperly exploited one or more physician-patient relationships; (5) Defendant's altercations with and threats and violence towards his parents; (6) Short-term incarceration did not deter the defendant from commission of further crime; and (7) Defendant's lack of remorse and his failure to accept responsibility for the Murder of his father Errol Beumel Sr.

Pet. App. 23, 26.

Finally, concerning Beumel's history of criminal activity, the court relied on five facts specifically found by the jury in its special verdict:

> (1) Defendant's history of criminal activity; (2) Defendant committed crimes while on bond; (3) Defendant's history of contacts with police for violence and unruly behavior; (4) Defendant's altercations with

> and threats and violence towards his parents; (5) Defendant's lack of remorse and failure to accept responsibility for the Murder of his father Errol Beumel Sr.

Pet. App. 27. In weighing these facts, the court explained that they deserved great weight because of their seriousness and because they demonstrate that Beumel was "unlikely ever to change." Pet. App. 28.

The court also considered evidence of mitigating factors presented by Beumel, including Beumel's young age, his lack of criminal convictions, and his alleged mental illness. Pet. App. 28. However, the court determined that these factors did not deserve much, if any, weight. Pet. App. 28-29. Finally, the court concluded that the aggravators outweighed the mitigators and, pursuant to the determinate-sentencing statute, increased the presumptive sentence by 10 years and imposed the maximum sentence of 65 years for murder and five years for the use of a firearm in the commission of an offense, with sentences to run consecutively. Pet. App. 31; Tr. 2117.

REASONS FOR DENYING THE PETITION

Invoking *Miranda*, Beumel unabashedly urges the Court to adopt sweeping rules that would constitutionalize the details of instructing juries at sentencing—and in some cases, ban jury sentencing altogether. Pet. 14-16. More precisely, Beumel asks the Court to impose three rules regulating post-*Blakely* jury-sentencing schemes: (1) "that any aggravators presented to a jury must be specifically enumerated by statute;" (2) that juries "decide[e] mitigators as well as aggravators;" and (3) that "juries may not . . . render opinions on a particular defendant's culpability in relation to . . . cases as a category" because they are "beyond a lay jury's expertise." Pet. 15-16. Beumel thus essentially argues that the Sixth Amendment right to jury trial somehow

requires juries to consider and balance relevant facts in a particular way and yet *precludes* them from deciding too much. Pet. 14-16.

The counterintuitive, counter-textual nature of this argument aside, history and practice do not support Beumel. Several states have long histories of employing juries not only to decide predicate facts related to sentencing, but also to determine the ultimate sentence. *See, e.g.*, Ark. Code § 5-4-103(a) ("If a defendant is charged with a felony and is found guilty of an offense by a jury, the jury shall fix punishment in a separate proceeding . . . ."); Ky. Rev. Stat. § 532.055 ("Upon return of a verdict of guilty . . . against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury. In the hearing the jury will determine the punishment to be imposed within the range provided . . . by law."); Va. Code § 19.2-295.1 ("In cases of trial by jury, upon a finding that the defendant is guilty of a felony or a Class 1 misdemeanor, . . . a separate proceeding limited to the ascertainment of punishment shall be held as soon as practicable before the same jury."). And the Court itself has explained that "States may adopt capital sentencing processes that rely upon the jury, in its sound judgment, to exercise wide judgment." *Tuilaepa v. California*, 512 U.S. 967, 974 (1994). Surely, such wide latitude is also permissible for non-capital sentencing juries.

These merits concerns are largely beside the point, however, because Beumel's Petition has significant threshold problems. First, he fails to establish any connection between the Sixth Amendment question he presents and any supposed limits on the role of sentencing-phase juries. Next, Beumel waived his sentencing-phase jury-trial rights below when he urged the trial court to remove the jury from his sentencing completely. Third, Beumel proposes his sweeping Sixth Amendment jury-instruction rules as a means to attack a single judge's *ad hoc* attempt to harmonize Indiana's now-

defunct determinate-sentencing scheme with the Court's decision in *Blakely*. Under these circumstances, where there is not even a split of authority begging for resolution, there is no need to review one trial court's attempt to cope with *Blakely* on-the-fly.

I. The Limits of the Question Presented and Beumel's Failure to Present Intelligible Constitutional Arguments Below Make this Case an Unsound Vehicle for Supreme Court Review

A. The question presented is limited to Sixth Amendment rights, but Beumel, if anything, asserts a violation of due-process rights

The question that Beumel presents in his Petition asks only whether submitting aggravators to a jury violates the Sixth Amendment right to a jury trial as announced in *Blakely v. Washington*, 542 U.S. 296 (2004). Pet. i. On its face, the question is bewildering. It is hard to conceive how a defendant's right to a jury trial could *ever* be violated by a practice that allowed the jury to find all facts that increased the defendant's sentence.

Even more significant for this stage of the case, however, the question presented does not coincide with the arguments Beumel makes in his Petition. If anything, Beumel makes arguments that sound in due process. In fact, at trial, Beumel explicitly relied on *due process* when objecting to the trial court's sentencing procedure. *See* Pet. App. 47 (Beumel's Motion to Dismiss State's Notice of Aggravators, arguing that the Notice did not "satisfy the due process clause" because it was "cumulative and fail[ed] to provide sufficient specificity to prepare a defense"); Tr. 2044 (arguing that the defendant's "right under due processes [sic] entitles him to have the jury decide aggravators"); *see also* Beumel Ind. Ct. App. Br. 24 (arguing that Beumel's sentence should be

overturned because certain aggravators were "issues that were reserved for the sentencing judge, not the jury").

Even now, Beumel only cites a handful of Sixth Amendment cases, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the cases decided in its wake. Pet. 7, 14. None of these cases, however, has anything to do with how courts are to instruct or otherwise manage juries in the course of implementing determinate-sentencing schemes. Instead, these cases simply enforce the Sixth Amendment command that all facts which increase a defendant's sentence above the statutory maximum must be proven beyond a reasonable doubt to the jury. *See Apprendi*, 530 U.S. at 490; *see also United States v. Booker*, 543 U.S. 220, 232 (2005); *Blakely*, 542 U.S. at 303-04; *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

The rest of Beumel's argument to the Court relies on notions of fairness and equity—concepts traditionally associated with due process. Pet. 9 (speaking of the "poisonous effect of such undue repetition"); Pet. 10 (arguing that "undue repetition of aggravators likely egged the jury on to find *more* aggravators than they otherwise would have"); Pet. 11 (arguing that the Notice of Aggravators "taints the jury's ability to fairly and neutrally assess the culpability of an act"). Beumel incants words from *Blakely*, but then argues that the Notice of Aggravators "was cumulative, derivative, and too vague to put him on notice of the State's sentence-enhancing allegations [to] let him prepare a meaningful defense." Pet. 6. Ultimately, the thrust of his argument seems to be that the sentencing-phase jury instructions were fatally insufficient. The constitutional sufficiency of jury instructions, however, is a matter of due process, not a matter of the right to jury trial. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Thus, there is no connection between Beumel's substantive arguments and *Blakely* or the Sixth Amendment.

As for the possibility that Beumel might be asserting legitimate due-process arguments, Beumel has pleaded himself out of this Court. The Court's rules expressly limit its consideration to the question presented in the Petition. *See* S. Ct. Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Rule 14.1(a) serves the important function of "reliev[ing] the respondent of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unpresented questions." *Yee v. City of Escondido*, 503 U.S. 519, 536 (1992); *id.* at 535 ("[W]e ordinarily do not consider questions outside those presented in the petition for certiorari."); *see also Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993) ("Our faithful application of Rule 14.1(a) thus helps us ensure that we are not tempted to engage in ill-considered decisions of questions not presented in the petition."). Thus, the Court should not grant certiorari to resolve the unpresented question of whether the sentencing procedure used in this case violated Beumel's due-process rights.

B. Beumel has waived his Sixth Amendment rights and any due-process arguments related to sentencing

Even if the Sixth Amendment does have something to do with how a court instructs a sentencing-phase jury—or even if due-process arguments are somehow within the scope of the question presented—Beumel has already waived the rights he now attempts to assert.

1. In the trial court, Beumel expressly relied *only* on the Due Process Clause and state law when objecting to the sentencing procedure. Pet. App. 52, 54 (objecting to sentencing based on due process). He in no way invoked his Sixth Amendment right to have a jury decide facts related to sentencing.

Even more revealing is *why* Beumel did not invoke the Sixth Amendment at trial. In his Motion to Dismiss the State's Notice of Aggravators, Beumel made five arguments, which are divisible into two groups: (a) two that betray Beumel's preference not to involve the jury in sentencing at all; and (b) three that attack on other statutory and due-process grounds the method of instructing the jury.

a. **Beumel's demands not to involve the jury**: In the first category, Beumel objected to the Notice of Aggravators on the grounds that he was entitled under the doctrine of amelioration to be sentenced under Indiana's new murder-sentencing statute. Beumel State App. 424-25. That new statute, again, eliminated determinate sentencing and with it *any* role for the jury in sentencing. *See* Ind. Code § 35-50-2-3(a); *see also* Ind. Code §§ 35-35-3-1; 35-50-2-1.3(a). The trial court, however, held that Beumel had to be sentenced under the old statute (with *Blakely/Smylie* modifications). Tr. 2049; *cf. Patterson v. State*, 532 N.E.2d 604, 608 (Ind. 1988). In a related but separate objection, Beumel also argued that state law (meaning the old sentencing statute) did not procedurally allow the jury to consider aggravators. Beumel State App. 426-27. This assertion was, of course, accurate, but the trial court, backed by the *Smylie* decision, ruled that engrafting the old determinate-sentencing statute with a jury fact-finding role was an acceptable solution. *See Smylie v. State*, 823 N.E.2d 679, 684-85 (Ind. 2005).

Taken together, these objections amount to a waiver of any Sixth Amendment right to have a jury consider the statutory aggravators *at all*, much less to have a jury be instructed in any particular way.

b. **Other statutory and due-process objections**: In the second category, Beumel argued that state law limited the consideration of aggravators to those specifically enumerated by statute. Pet. App. 47 (arguing that the "legislature has evidenced its intent that certain specific aggravators . . . are

no longer proper aggravators to be considered in sentencing"). In a similar vein, Beumel argued that, to the extent it permitted consideration of factors *other* than those specifically enumerated by statute, Indiana's determinate-sentencing scheme was unconstitutionally vague and ambiguous. Beumel State App. 425-26. Finally, Beumel argued that the Notice of Aggravators did not satisfy "due process" because it was "cumulative and fail[ed] to provide sufficient specificity to prepare a defense." Pet. App. 47.

Only two of these have anything to do with constitutional rights, and both of those plainly invoke due-process principles, not Sixth Amendment principles (which is consistent with Beumel's stated preference not to be sentenced by a jury). Beumel thus did not preserve for review any Sixth Amendment arguments.[3]

2. On appeal, Beumel complained about the way the trial court instructed the jury as to sentencing, calling the instructions "repetitive" and otherwise improper. Beumel Ind. Ct. App. Br. 24-28. But there, he based his arguments entirely on *state* law, not the Sixth Amendment or even the Due Process Clause of the Fourteenth Amendment. Beumel cryptically argued that, under state law, "derivative" aggravators could not be considered as "separate" aggravators, but instead "may only be considered in regard to the weight to be assigned to the other aggravator[s]." Beumel Ind. Ct. App. Br. 25. He also argued that weighing

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[3] To be sure, Beumel cited *Blakely* to the trial court, but only nominally and not for any intelligible Sixth Amendment claim. Beumel State App. 424-29; Pet. App. 43-49. Beumel invoked *Blakely* only to explain that its "impact on . . . Indiana sentencing has been significant and unexpected" and that *Blakely* "and its aftermath have significantly increased the procedural protections provided to defendants relevant to sentencing and have clearly emphasized the importance of a defendant's constitutional rights." Beumel State App. 426.

aggravators was not a jury function at all, but the function of the sentencing judge under state law. Beumel Ind. Ct. App. Br. 25. Beumel cited *Blakely* for the proposition that weighing aggravators constitutes a legal judgment and thus was untouched by *Apprendi* and its progeny, but did not invoke *Blakely* (or *Apprendi*) for the notion that a court must instruct a sentencing jury in any particular way. Beumel Ind. Ct. App. Br. 27.

Thus, Beumel's opening brief in the Indiana Court of Appeals did not include an argument based on *Blakely* or the Due Process Clause. *See* Appellant's Br. 24-28. And his reply brief in that court did not cite *any* federal cases. *See* Beumel Ind. Ct. App. Reply Br. 6-8. Not surprisingly, the Indiana Court of Appeals did not address whether the trial court's *ad hoc* attempt to deal with *Blakely* was constitutionally permissible. Pet. App. 14-18; *see also* Pet. App. 16 n.1 ("Defendant does not challenge the three aggravating factors found by the trial court or the trial court's balancing of aggravating or mitigating factors.").

3. When seeking discretionary review by the Indiana Supreme Court, Beumel for the first time began to formulate and assert the Sixth Amendment right that he presents in his Petition to this Court. Beumel Pet. to Transfer i. Beumel's questions presented included the following: "Are a defendant's *Blakely* and *Smylie* rights violated by submitting a redundant list of derivative aggravators to a sentencing-phase jury, and expressly inviting the jury to perform the sentencing judge's balancing of those aggravators?" Beumel Pet. to Transfer i.

Beumel argued to the Indiana Supreme Court that his case would help it fashion rules for jury instructions at the sentencing phase. Beumel Pet. to Transfer 8-10. However, he based the need for such rules on the notion that instructions "must not bias the jury by unduly emphasizing particular facts." Beumel Pet. to Transfer 8. This focus on

the notion of *bias* is yet another invocation of *due-process* principles, not Sixth Amendment rights. Beumel also reiterated his argument that consideration of "derivative" aggravators was, under state law, part of "weighing," and that other aggravators required legal conclusions that state law similarly reserved for the sentencing judge. Beumel Pet. to Transfer 8-9. Ultimately, despite how he initially phrased the issues, Beumel did not explicitly rely on *Blakely* or the Sixth Amendment in his arguments to the Indiana Supreme Court. And, again, the Indiana Supreme Court ultimately denied review. Pet. App. 33-34.

* * *

Supreme Court Rule 14.1(g)(i) requires that a petitioner explain in detail where the "federal questions sought to be reviewed were raised; the method and manner of raising them and the way in which they were passed on by [the state] courts." Beumel has not complied with that Rule and, in fact, would have this Court be the first to address the application of the Sixth Amendment and *Blakely* to this case. As the Court has repeatedly explained, it "does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

II. There is No Call to Review a Single Judge's *Ad Hoc* Post-*Blakely* Jury-Sentencing Procedure, Especially in a Case from a State that has Abandoned Determinate Sentencing

Beumel identifies no reasons why consideration of this case is in any way a matter of pressing national concern. He does not, and cannot, assert a lower-court conflict as the basis for granting review, and he makes no attempt to show that the flaws he claims plagued the *ad hoc* process used below arise anywhere else with any frequency.

Beumel himself admits that his case is "unusual"—though he argues, without a shred of proof, that this case somehow "typifies State trial courts' difficulties in implementing *Blakely*." Pet. 5, 7. And he essentially concedes that this case does not provide a useful vehicle for building on *Blakely* when he acknowledges that important *Blakely* implementation issues can be resolved only if the case were "consolidated with other cases raising similar issues." Pet. 7. Yet Beumel makes no attempt to identify any such cases that might be in the pipeline on their way to the Court. He does not even describe in general terms the types of cases and issues the Court might look for to complement review of this case. Beumel evidently expects the Court to take the case on blind faith that, in doing so, it can resolve some ill-defined national problem that has yet to emerge.

Even if there truly is some nationally important, post-*Blakely* jury-sentencing issue lurking in the shadows, a case from Indiana is not the place to resolve it. Again, Indiana has now scrapped determinate sentencing altogether. *See, e.g.*, Ind. Code §§ 35-50-2-1.3(a), 35-50-2-3(a). So even if there were some constitutional defect in the sentencing process used by the trial court in this case, no future Indiana cases or defendants would benefit from a Supreme Court ruling here. And, to be candid, with no determinate-sentencing system at stake, Indiana lacks the proper incentives to mount a thoroughgoing defense of *any* particular mode of involving juries in the sentencing process. If the Court is looking for a post-*Blakely* jury-sentencing scheme to review, it should wait for a case from a State that actually has one.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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Dated: August 29, 2007

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No. 06-1640

In The

Supreme Court of the United States

ERROL D. BEUMEL, JR.,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition For Writ Of Certiorari To The Indiana Supreme Court

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are a defendant's Sixth Amendment rights under *Blakely v. Washington* violated by submitting a redundant list of derivative aggravators to a sentencing-phase jury, and requiring it to make determinations that are beyond the competence of a lay jury?

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Errol D. Beumel, Jr. respectfully states as follows in reply to the State of Indiana's Brief in Opposition to the Petition.

ARGUMENT

I. Any Due-Process Issue Implicit in Mr. Beumel's Petition Is a *Subset* of the Question Presented — Not a Separate, Unpresented Issue.

Tellingly, the State of Indiana makes no effort to deny the constitutional repugnance of Mr. Beumel's sentence. Instead, it quibbles with his Question Presented, claiming his constitutional injury was more like Due Process than the Sixth Amendment, and should therefore be ignored entirely. But that argument misstates the real Question Presented, short-changes the interests at stake under the Sixth Amendment, and misreads S. Ct. Rule 14.1(a).

First, the State constructs a straw man by claiming that Mr. Beumel's question was merely "whether submitting aggravators to a jury violates the Sixth Amendment," then attacks that misstated question as "bewildering." Response at 11. Though such a question would indeed be patently nonsensical in light of *Blakely v. Washington*, it is not the question Mr. Beumel has actually raised. Instead, his real claim is that "submitting a *redundant* list of *derivative* aggravators" to the jury is constitutionally infirm. *See* Petition for Writ of Certiorari, p. *i* (emphases added). Only by ignoring the two most-critical words in the Question Presented can the State so blithely dismiss such a significant question.

Next, the State notes the strong Due Process overtones of Mr. Beumel's substantive arguments, in order to fault his Question Presented for being framed in Sixth Amendment terms. But Due Process implications are inherent in the Sixth Amendment — because like Due Process, it is both procedural (by prescribing the jury mechanism at all) and substantive (by regulating *which* facts must be determined through that mechanism, as *Blakely* and its forebears illustrate). As *Blakely* noted, the jury right "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure," serving to "ensure [the people's] control in the judiciary." 542 U.S. 296, 305-06 (2004). When the State skews sentence-phase instructions to goad the jury towards an aggravated sentence, it does more than intrude into the Due Process rights of a particular accused — it manipulates one of the few checks the people as a whole wield against the power of the judiciary. Thus, even though it may be helpful to view Mr. Beumel's constitutional injury through a Due Process lens on the individual level, that does not diminish its broader Sixth Amendment implications.

Accordingly, whether cast as Sixth Amendment or Due Process, Mr. Beumel has properly presented his question for this Court's review. This Court's attention under Rule 14.1(a) is not limited to issues that can be superficially spotted "from a galloping horse" on the face of a Question Presented. Rather, the plain language of the Rule provides that this Court will consider "questions set out in the petition, *or fairly included therein*" (emphasis added). The Rule's purpose, though important, is simply prudential — it prevents a respondent from being blindsided, and "relieves [it] of . . . the burden of opposing certiorari on unpresented questions." *Yee v. City of Escondido*, 503 U.S. 519, 536 (1992); *accord*, Response at 13 (quoting *Yee*). Those concerns are greatest *after* a grant of certiorari — for

example, using merits briefs to "smuggl[e] additional questions into a case after [the Court] grant[s] certiorari." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp.*, 510 U.S. 27, 34 (1993) (internal quotation omitted).

By contrast, when this Court finds *before* granting review that a petition raises a meritorious issue beyond what is expressly presented, the Order granting certiorari will occasionally "rephrase[ ] the question presented by a petitioner" — or even "request[ ] the parties to address an important question of law" that the petition had not raised at all. *Yee*, *supra*, 503 U.S. at 535, *citing Ankenbrandt v. Richards*, 502 U.S. 1023 (1992) and *Payne v. Tennessee*, 498 U.S. 1080 (1991).

Here, the purposes of Rule 14.1(a) have been (or easily can be) accomplished. First, the State has not in any way been sandbagged. To the contrary, it readily identified the Due Process overtones of Mr. Beumel's Sixth Amendment question — which tends to indicate that even its reframed question is "fairly included" in the one Mr. Beumel has raised. If the Court would prefer to grant review on that narrower basis, its order granting certiorari may simply say so, to keep any new issue from being "smuggled" into the merits briefing. But whether in broad Sixth Amendment or narrow Due Process form, Mr. Beumel's basic question is properly before this Court.

II. Mr. Beumel's Question Has Been Sufficiently Preserved for This Court's Review.

The State next argues that Mr. Beumel's claims have been waived, again hoping to avoid addressing them on the merits. First, it admits Mr. Beumel has consistently objected to the sentencing-phase jury instructions throughout this case — yet claims he waived review by having also

advanced an alternative argument in the trial court that supposedly "betray[s his] preference not to involve the jury in sentencing at all." Response at 14. But that misrepresents Mr. Beumel's trial-level argument, which was merely that *if* the "doctrine of amelioration" (a State-law rule) did not require the court to apply Indiana's new indeterminate sentencing system, *then* it would have to ensure the constitutionality of the *ad hoc* jury procedures it would need to graft onto the old determinate system. Such alternative arguments do not constitute waiver. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 573 n. 1 (1991) ("[T]he State's argument below was in the alternative: (1) that the statute does not implicate the First Amendment . . . , and (2) that the statute in any event survives First Amendment scrutiny . . . . The second argument can be claimed to contradict the first . . . ; but it certainly does not waive or abandon it.") (Scalia, J., concurring). Accordingly, the Question Presented is not waived.

III. When This Court Reviews a Case, It Addresses the Whole Nation, Not Just the Case's State of Origin — and This Case Would Guide the States That Still Use Determinate Sentencing.

Finally, the State argues this case presents no significant issue for review because Indiana "has now scrapped determinate sentencing altogether." Response at 18. But that contention ignores the authorities discussed in Mr. Beumel's petition, and reflects a myopic view of the nature of certiorari.

First, the State claims Mr. Beumel has failed to show how his case raises "a matter of pressing national concern," or that the errors in his case are common. Response at 17. But his Petition discussed how post-*Blakely* scholarship has anticipated these very problems (arising from "anchor" and "decoy" effects), and recognized that this Court would

likely need to "further develop[ ] its Sixth Amendment jurisprudence" even beyond its *Blakely* followup in *United States v. Booker*, 543 U.S. 220 (2005). *See generally* Petition at 9-13, *quoting* J.J. Prescott and Sonja Starr, *Improving Criminal Jury Decision Making after the* Blakely *Revolution*, 2006 U. ILL. L. REV. 301 and Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Sentencing Reform*, 58 STAN. L. REV. 235 (Oct. 2005). It is hardly surprising that problems that were so readily predicted in theory have indeed arisen in practice — nor, contrary to the State's claims (*see* Response at 18), does it require any "blind faith" to recognize they are likely to recur without this Court's intervention and guidance.

Finally, the State concludes its Response by noting Indiana's abolition of determinate sentencing, and argues "[i]f the Court is looking for a post-*Blakely* jury-sentencing scheme to review, it should wait for a case from a State that actually has one." Response at 18. That rationale helps explain the high *State* Court's denial of discretionary review, but suggests a markedly short-sighted and provincial idea of *this* Court's review.

On certiorari, this Court addresses the entire Nation through its analysis; the particular State to which the resulting mandate is issued is little more than a historical footnote. Although this Court "evaluate[s] state procedures one at a time, as they come before" the Court for review, *Smith v. Robbins*, 528 U.S. 259, 275 (2000), it does not do so for the benefit of a particular litigant — even when that litigant is a State — but because of the importance of the *issue* involved. *See generally* S. Ct. Rule 10 (describing "the character of reasons the Court considers" in whether to grant certiorari).

Here, Mr. Beumel's type of constitutional injury could have been inflicted — and could be inflicted again — in *any* State with jury sentencing, regardless of whether Indiana is still one of them. His case provides an opportunity to refine the State-level implementation of *Blakely* to prevent future defendants from being subjected to the same harms. If review is to be denied, it should be for a reason more compelling than the State of Indiana's loss of motivation to find rationalizations for the constitutionally repugnant procedure to which Mr. Beumel was subjected.

CONCLUSION

For all of the foregoing reasons, Petitioner Errol D. Beumel, Jr. again respectfully prays this Court for a Writ of Certiorari to the Indiana Supreme Court.

Respectfully submitted,

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